

VOLUME 8

PAGES 1511 - 1657

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIGITAL REG OF TEXAS, LLC	)	
	)	
PLAINTIFF,	)	NO. C-12-1971 CW
	)	
VS.	)	THURSDAY, SEPTEMBER 4, 2014
	)	
ADOBE SYSTEMS, INC., ET AL.,	)	OAKLAND, CALIFORNIA
	)	
DEFENDANTS.	)	JURY TRIAL
_____	)	

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFF:**

DINOVO, PRICE, ELLWANGER & HARDY LLP  
7000 NORTH MOPAC EXPRESSWAY, SUITE 350  
AUSTIN, TEXAS 78731

BY: ANDREW G. DINOVO, ESQUIRE  
ADAM G. PRICE, ESQUIRE  
GREGORY DONAHUE, ESQUIRE  
JAY D. ELLWANGER, ESQUIRE  
NICOLE E. GLAUSER, ESQUIRE

BARTKO ZANKEL BUNZEL MILLER  
ONE EMBARCADERO CENTER, SUITE 800  
SAN FRANCISCO, CALIFORNIA 942111

BY: W. PAUL SCHUCK, ESQUIRE

**ALSO PRESENT:**

MICHAEL FARLEY, COMPANY REPRESENTATIVE

(APPEARANCES CONTINUED)

**REPORTED BY:**

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR  
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**FOR DEFENDANT  
ADOBE SYSTEMS:**

WEILL, GOTSHAL & MANGES, LLP  
201 REDWOOD SHORES PARKWAY  
REDWOOD SHORES, CALIFORNIA 94065

BY: EDWARD R. REINES, ESQUIRE  
SONAL N. MEHTA, ESQUIRE  
BYRON BEEBE, ESQUIRE  
ANANT PRADHAN, ESQUIRE

**ALSO PRESENT:**

PAUL BETLEM, COMPANY REPRESENTATIVE  
KAREN ROBINSON, IN-HOUSE COUNSEL

## I N D E X

	<u>PAGE</u>	<u>VOL.</u>
CLOSING ARGUMENT BY MR. ELLWANGER	1549	8
CLOSING ARGUMENT BY MS. MEHTA	1584	8
CLOSING ARGUMENT BY MR. REINES	1619	8
REBUTTAL CLOSING ARGUMENT BY MR. ELLWANGER	1635	8

**PLAINTIFF'S EXHIBITS**

EVD. VOL.

179.001 - 179.003

1521 8

1 THURSDAY, SEPTEMBER 4, 2014

8:24 A.M.

2 P R O C E E D I N G S

3 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

4 **THE CLERK:** REMAIN SEATED. COME TO ORDER. COURT IS  
5 IN SESSION.

6 **THE COURT:** GOOD MORNING. I WILL TELL YOU WHAT I'VE  
7 DONE WITH THE INSTRUCTIONS. YOU HAVE A COPY THERE. THAT'S  
8 ACTUALLY NOT TOTALLY FINAL. THERE'S A MISTAKE IN THERE, BUT I  
9 WILL GO THROUGH AND TELL YOU WHAT I DID, WHERE THERE WERE  
10 CHANGES MADE.

11 THE FIRST ONE IS ON PAGE 4. I ADDED A SENTENCE AT LINE 18  
12 TO 20 OR 19 TO 21, I GUESS, THE FALSO IN UNO SENTENCE.

13 PAGE 5, I ADDED THE SENTENCES ABOUT THE COURT REPORTER  
14 TAKES CUSTODY OF THE DOCUMENTS IN THE DEPOSITION SECTION AND  
15 ALSO A SENTENCE ABOUT THE WITNESS CAN MAKE CORRECTIONS.

16 THEN ON PAGE 7, I FOUND A REFERENCE AT LINE 7 TO  
17 "CONTRIBUTED TO", SO I TOOK THAT OUT.

18 AND ON PAGE 9, I JUST REORGANIZED IT A LITTLE BIT TO MAKE  
19 IT FLOW BETTER. AT THE END OF THE GENERAL INFRINGEMENT  
20 SECTION, IT STOPS WITH -- WELL, IT GOES TO "CAPABLE OF  
21 INFRINGING USE" AND THEN I'M GOING TO ADD A SENTENCE THERE OR  
22 REMOVE A SENTENCE UP TO THERE WHICH SAYS, "IN THIS CASE,  
23 DIGITAL REG ARGUES THAT ADOBE INFRINGED ITS PATENTS BOTH  
24 DIRECTLY AND INDIRECTLY". THAT'S THE INTRO TO THE NEXT PART  
25 WHICH THEN GOES TO DIRECT INFRINGEMENT. "TO DECIDE", ET

1 CETERA. THAT PARAGRAPH, THE SENTENCE THAT'S AT THE END OF  
2 THAT PARAGRAPH IN YOUR VERSION THAT SENTENCE IS WHAT GETS  
3 MOVED TO UP TO THE END OF THE LAST SECTION TO INTRO THE DIRECT  
4 VERSUS INDIRECT. IT JUST FLOWS BETTER THAT WAY.

5 OKAY. THEN WE HAVE -- THE NEXT SECTION THEN IS INDIRECT  
6 INFRINGEMENT AND IT'S GOING TO SAY "INDIRECT INFRINGEMENT:  
7 INDUCING INFRINGEMENT" AS THE HEADING. AND THEN -- THEN WE  
8 INTRO THAT WITH THE -- MOVING A SENTENCE THAT WAS SOMEWHERE  
9 ELSE BEFORE. ADOBE ALSO -- "DIGITAL REG ALSO ALLEGES ADOBE  
10 INDIRECTLY INFRINGED". DEFINE INDIRECT INFRINGEMENT.

11 I'M NOT -- THEN I'M GOING TO ADD THE SENTENCE THAT DIGITAL  
12 REG WANTS ABOUT WILLFULLY BLIND.

13 AND THEN IN THE WILLFULNESS INSTRUCTION, WHERE WE HAVE NOW  
14 ON PAGE 12, LINE 3 TALKING ABOUT THE 125, I SAY, "MR. VENTERS  
15 TESTIFIED THAT HE SENT TO ADOBE VENTURES A DOCUMENT ENTITLED  
16 'ADOBE VALUE PROPOSITION'. SUCH A DOCUMENT WAS ADMITTED AS  
17 125C, DIFFERENT VERSIONS EXIST", ET CETERA.

18 I'M NOT GOING TO ADD THE SENTENCE THAT DIGITAL REG  
19 PROPOSED ABOUT SECRECY, BUT WHAT I AM GOING TO DO -- I LOOKED  
20 WHERE THE SECRECY THINGS COME FROM, AND I FOUND THEM. THEY'RE  
21 IN THE FORM INSTRUCTION ABOUT THE DIFFERENT PRONGS OF  
22 ANTICIPATION.

23 AND WHERE THEY COME FROM IS 102, AND CASE LAW GLOSSES ON  
24 102, WHICH IT MAKE VARIOUS REFERENCES TO BEING ABLE TO FIND  
25 DOCUMENTS IN THIS AND THAT. SO INSTEAD OF STICKING IN THERE

1 SEPARATELY WITHOUT AUTHORITY, I PUT BACK IN ALL OF THE  
2 ANTICIPATION POSSIBILITIES THAT MR. REINES RELUCTANTLY AGREED  
3 TO TAKE OUT. I PUT THEM BACK IN WITH THEIR RESPECTIVE SECRECY  
4 REQUIREMENTS.

5 SO TO SUM UP, THE SENTENCE THAT DIGITAL REG WANTED, I DID  
6 NOT ADD, BUT UNDER ANTICIPATION YOU'LL SEE THE 102 FACTORS  
7 WHICH DO HAVE THEIR OWN INTERNAL PUBLICITY REQUIREMENTS. SO I  
8 THINK THAT IS AN ACCURATE STATEMENT OF THE LAW.

9 UNDER OBVIOUSNESS, WE TALKED ABOUT THE CHANGE YESTERDAY  
10 THAT I MADE. AND THAT'S JUST HOW IT IS NOW. "THE ULTIMATE  
11 CONCLUSION OF WHETHER A CLAIM IS OBVIOUS SHOULD BE BASED UPON  
12 YOUR DETERMINATION OF SEVERAL FACTUAL DECISIONS", AND THEN WE  
13 GO 1 THROUGH 5. WE TALKED ABOUT THAT YESTERDAY.

14 AND THEN I'M JUST GOING TO LEAVE IN ALL OF THE  
15 OBVIOUS/NONOBVIOUS FACTORS. WE TALKED ABOUT CUTTING SOME OF  
16 THEM OUT; I AM JUST GOING TO LEAVE THEM ALL IN.

17 WE TALKED YESTERDAY ABOUT THE DAMAGES, BURDEN OF PROOF,  
18 FIRST PARAGRAPH. AND I USE THIS SENTENCE THAT WE AGREED ON  
19 YESTERDAY. "COMPENSATE IT FOR INFRINGEMENT BY THE USE OF  
20 ADOBE'S ACCUSED PRODUCTS."

21 THEN ON THE LUCENT QUESTION, I'M NOT GOING TO GIVE IT IN  
22 THE WAY THAT DIGITAL REG ASKED. HOWEVER, I DID WRITE A  
23 SENTENCE STARTING WITH THE PARAGRAPH, "ALTHOUGH" ON PAGE 18 AT  
24 LINE 6, WHICH COMES FROM LUCENT AND I THINK IS AN ACCURATE  
25 STATEMENT. "ALTHOUGH THERE IS NO RIGID REQUIREMENT THAT

1 DAMAGES IN ALL CIRCUMSTANCES BE LIMITED TO SPECIFIC INSTANCES  
2 OF INFRINGEMENT PROVEN WITH DIRECT EVIDENCE, THE DAMAGES AWARD  
3 MUST BE CORRELATED TO THE EXTENT THE INFRINGING METHOD IS USED  
4 BY CONSUMERS BECAUSE THIS IS WHAT THE PARTIES TO THE  
5 HYPOTHETICAL NEGOTIATION WOULD HAVE CONSIDERED."

6 AND THEN THAT'S FOLLOWED BY THE SENTENCE THAT ADOBE WROTE  
7 WHICH WE HAD TALKED ABOUT YESTERDAY.

8 AND THEN I ADDED IN THE CLAIM DEFINITIONS, I HAD TO  
9 REWRITE IT A LITTLE BIT, BUT "BASED ON" -- THIS IS PAGE 29,  
10 LINE 12. "BASED ON WHETHER OR NOT NOTIFICATION INFORMATION  
11 WAS SENT", THEN THE SENTENCE I ADDED FROM THE CLAIM  
12 CONSTRUCTION ORDER READS, "THE PATENTED INVENTION GRANTS  
13 ACCESS IMMEDIATELY UPON THE ATTEMPT TO TRANSMIT NOTIFICATION  
14 WITHOUT WAITING FOR A RESPONSE FROM THE SERVER".

15 AND THEN I PUT BACK IN THE AGREED-UPON DEFINITION OF  
16 "EXECUTING AN INSTALLATION PROCESS".

17 SO I THINK THIS IS ALL WORKABLE. I GAVE YOU A NEW VERDICT  
18 FORM. THE ONLY CHANGE THERE WAS THE NUMBERING IS CORRECTED.

19 OH, I NEED A COPY OF THAT VERDICT FORM.

20 **THE CLERK:** I PUT A COPY UP THERE.

21 **THE COURT:** OKAY. I'M NOT REALLY ASKING FOR ANY MORE  
22 COMMENTS, BUT IF YOU HAVE ANYTHING EARTHSHAKING, YOU CAN TELL  
23 ME.

24 I DON'T KNOW WHAT HAPPENED TO THIS MONITOR. I CAN'T SEE  
25 YOU ALL ANYMORE. IT DIDN'T USED TO BE THERE.

1           **THE CLERK:** IT'S A MONITOR THEY PUT UP.

2           **THE COURT:** OH, OKAY. I DON'T KNOW WHOSE MONITOR  
3 THAT IS, BUT IT BLOCKS MY VIEW OF COUNSEL.

4           **MS. GLAUSER:** I DON'T HAVE ANYTHING.

5           **THE COURT:** ANYTHING YOU FEEL THE NEED TO ADD?

6           **MR. REINES:** NOTHING EARTHSHAKING, OBVIOUSLY  
7 PRESERVING OUR PRIOR-STATED OBJECTIONS.

8           **THE COURT:** I DID GO BACK AND LOOK AT THE MOTIONS  
9 THAT YOU WERE ALLUDING TO. YOU MADE THAT MOTION; I DENIED  
10 THAT MOTION IN WRITING. IT PROPOSED STRIKING THE EXPERT'S  
11 TESTIMONY ON THE POINT, AND I WILL NOT STRIKE IT. IT  
12 OBVIOUSLY HAS PROBLEMS, AND THE PROBLEMS ARE ADDRESSED IN THE  
13 INSTRUCTION, AND YOU CAN ARGUE THEM, BUT I'M NOT GOING TO  
14 STRIKE THE EXPERT'S TESTIMONY.

15           **MR. REINES:** HOPEFULLY, DEPENDING ON THE OUTCOME, YOU  
16 WILL LOOK FRESH AT THAT SITUATION AND THE RECORD.

17           **THE COURT:** TRUE.

18           **MS. GLAUSER:** WE DIDN'T HAVE ANYTHING ON THE JURY  
19 INSTRUCTIONS EITHER, JUST RESERVING THE OBJECTIONS WE'VE  
20 ALREADY MADE.

21           THERE WERE A FEW EVIDENCE ISSUES THAT I THINK ARE REALLY  
22 JUST HOUSEKEEPING, THOUGH.

23           THE PARTIES FILED A STIPULATION REGARDING THE EVIDENCE  
24 THAT WE CAME TO AGREEMENT ON COULD BE ADMITTED BASED ON THE  
25 LIMITED PAGES. SO WE'VE PROVIDED THAT TO MS. RILEY, BUT I



1 DON'T KNOW THAT IT CAN BE ACTUALLY ADMITTED UNTIL YOU'VE RULED  
2 ON THAT STIPULATION.

3 **THE COURT:** OKAY. I CAN GAVEL IT. I CAN RULE ON IT  
4 ONLINE.

5 **MS. GLAUSER:** THERE'S A SIMILAR SOURCE CODE EXHIBIT.  
6 WE FILED A MOTION TO SUBMIT IT MANUALLY AND TO HAVE IT UNDER  
7 SEAL. ADOBE HAS REQUESTED THAT IT REMAIN UNDER SEAL SINCE THE  
8 PRESENTATION JUST REFERRED TO THE PAGE AND LINE AND DIDN'T  
9 NECESSARILY REVEAL THE UNDERLYING CODE.

10 SO WE FILED THAT MOTION FOR PERMISSION TO SUBMIT UNDER  
11 SEAL. THEY REVIEWED OUR SOURCE CODE SUBMISSION, HAVE APPROVED  
12 IT, AND SO WE WILL PROVIDE THAT AS WELL TO MS. RILEY AND SEEK  
13 TO OFFER THAT AT THIS TIME.

14 **THE COURT:** OKAY. DID YOU FILE A SEALING ORDER?

15 **MS. GLAUSER:** WE DID.

16 **THE COURT:** SO I CAN DO THAT ONLINE AS WELL.

17 **MS. GLAUSER:** YES.

18 AND THEN THE LAST ONE, YOUR HONOR, IS WE FILED AN OFFER OF  
19 PROOF REGARDING TRIAL EXHIBIT 179. WE HAVE OFFERED IT DURING  
20 TRIAL, AND THERE WAS NO OBJECTION BY ADOBE. YOUR HONOR RULED  
21 THAT WE MAY NOT NEED ALL OF THE PAGES, SO WE HAVE NOW LIMITED  
22 IT TO JUST THREE PAGES.

23 THIS IS THE EXHIBIT THAT HAD THE TOOLBAR THAT INDICATED  
24 ONLY THE MOST COMMON FEATURES WERE PROVIDED ON THE TOOLBAR.  
25 WE ARE ONLY SEEKING TO OFFER THREE PAGES FROM THAT EXHIBIT.

1 ADOBE IS NOW OBJECTING TO IT, AND SO WE SUBMITTED AN OFFER  
2 OF PROOF TO NOW MOVE THOSE THREE PAGES OF EXHIBIT 179 INTO  
3 EVIDENCE.

4 **MR. REINES:** THAT WAS THE SITUATION WHERE THE WITNESS  
5 DIDN'T KNOW ABOUT THE DOCUMENT AT ALL. THE COURT DID NOT  
6 APPROVE IT AND DID NOT TAKE IT UNDER SUBMISSION.

7 AND WE WOULD OBJECT. IT'S THAT COMPLICATED STRUCTURE THAT  
8 HAS NO FOUNDATION.

9 **THE COURT:** WELL, ISN'T IT JUST A SCREEN SHOT OF THE  
10 MENU DROP DOWN?

11 **MS. GLAUSER:** YES, IT IS A SCREEN SHOT FROM ADOBE'S  
12 WEBSITE. AND MR. HERBACH WAS ABLE TO TESTIFY ABOUT WHAT WAS  
13 HAPPENING ON THAT EXHIBIT. THERE WAS NO OBJECTION FROM ADOBE.  
14 AND WE CITED IN OUR OFFER OF PROOF THE LINES FROM THE TRIAL  
15 TRANSCRIPT WHERE YOUR HONOR TOOK IT UNDER SUBMISSION.

16 **THE COURT:** WHAT ARE THE PAGES YOU WANT?

17 **MS. GLAUSER:** IT'S THE PAGES OF THE EXHIBIT THAT WE  
18 WANT ARE 179.001 TO 179.003.

19 **THE COURT:** AND THESE ARE PAGES FROM AN ONLINE MANUAL  
20 OR SOMETHING LIKE THAT OF ADOBE'S, RIGHT?

21 **MR. REINES:** I DON'T KNOW WHEN THEY TOOK THE SCREEN  
22 SHOTS. AND WE DIDN'T HAVE ANY WITNESS SAY WHEN IT WAS TAKEN,  
23 WHAT IT WAS IS AN ACCURATE REPRESENTATION --

24 **THE COURT:** IT'S NOT A FORGERY. IT WAS TAKEN FROM  
25 SOMETHING.

1           **MS. GLAUSER:** YOUR HONOR, THE PARTIES HAVE STIPULATED  
2           THAT THE DOCUMENTS PRODUCED BY THE PARTY FROM THEIR OWN  
3           POSSESSIONS ARE AUTHENTIC. SO THERE'S NO AUTHENTICITY  
4           OBJECTION TO THIS EXHIBIT.

5           **THE COURT:** OKAY. I WILL ALLOW IT.

6           (PLAINTIFF'S EXHIBITS 179.001 - 179.003 RECEIVED IN  
7           EVIDENCE)

8           **THE COURT:** IS THAT IT?

9           **MS. GLAUSER:** I BELIEVE THOSE ARE ALL THE OUTSTANDING  
10          EVIDENTIARY ISSUES.

11          **MR. REINES:** YES. ONE THING WE WOULD ASK, AND I KNOW  
12          YOU ARE WORKING VERY HARD ON IT AND TRYING TO DO IT AS QUICKLY  
13          AS YOU CAN, BUT TO THE EXTENT THE JURY INSTRUCTIONS GET  
14          FINALIZED, IF THEY CAN BE E-FILED WITH THE COURT SO THAT WE  
15          HAVE ACCESS TO THEM FOR OUR PURPOSES?

16          **THE COURT:** SURE.

17          **MR. REINES:** THAT WOULD BE A CONVENIENCE. THAT WOULD  
18          BE APPRECIATED VERY MUCH.

19          **THE COURT:** SURE.

20          (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)

21          **THE COURT:** PLEASE BE SEATED.

22          MEMBERS OF THE JURY: NOW THAT YOU HAVE HEARD ALL OF THE  
23          EVIDENCE, IT IS MY DUTY TO INSTRUCT YOU AS TO THE LAW OF THE  
24          CASE.

25          A COPY OF THESE INSTRUCTIONS WILL BE SENT WITH YOU TO THE

1 JURY ROOM WHEN YOU DELIBERATE. THESE FINAL INSTRUCTIONS  
2 CONTROL AND YOU SHOULD NOT CONCERN YOURSELF WITH ANY  
3 DIFFERENCES BETWEEN THEM AND THE PRELIMINARY INSTRUCTIONS.  
4 YOU MUST NOT INFER FROM THESE INSTRUCTIONS OR FROM ANYTHING I  
5 MAY SAY OR DO THAT I HAVE AN OPINION REGARDING THE EVIDENCE OR  
6 WHAT YOUR VERDICT SHOULD BE.

7 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE EVIDENCE IN  
8 THE CASE. TO THOSE FACTS YOU WILL APPLY THE LAW AS I GIVE IT  
9 TO YOU. YOU MUST FOLLOW THE LAW AS I GIVE IT TO YOU WHETHER  
10 YOU AGREE WITH IT OR NOT. AND YOU MUST NOT BE INFLUENCED BY  
11 ANY PERSONAL LIKES OR DISLIKES, OPINIONS, PREJUDICES, OR  
12 SYMPATHY. THAT MEANS YOU MUST DECIDE THE CASE SOLELY ON THE  
13 EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YOU TOOK AN OATH TO  
14 DO SO.

15 IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW ALL OF THEM  
16 AND NOT SINGLE OUT SOME AND IGNORE OTHERS; THEY ARE ALL  
17 IMPORTANT.

18 THE EVIDENCE YOU ARE TO CONSIDER IN DECIDING WHAT THE  
19 FACTS ARE CONSISTS OF:

20 THE SWORN TESTIMONY OF ANY WITNESS;

21 THE EXHIBITS RECEIVED INTO EVIDENCE;

22 ANY FACTS TO WHICH THE PARTIES HAVE AGREED.

23 IN REACHING YOUR VERDICT, YOU MAY CONSIDER ONLY THE  
24 TESTIMONY AND EXHIBITS RECEIVED INTO EVIDENCE AND ANY FACTS TO  
25 WHICH THE PARTIES HAVE AGREED. CERTAIN THINGS ARE NOT

1 EVIDENCE, AND YOU MAY NOT CONSIDER THEM IN DECIDING WHAT THE  
2 FACTS ARE. I WILL LIST THEM FOR YOU.

3 ARGUMENTS AND STATEMENTS BY LAWYERS ARE NOT EVIDENCE. THE  
4 LAWYERS ARE NOT WITNESSES. WHAT THEY SAID IN THEIR OPENING  
5 STATEMENTS, WILL SAY IN THEIR CLOSING ARGUMENTS, AND AT OTHER  
6 TIMES IS INTENDED TO HELP YOU INTERPRET THE EVIDENCE, BUT IT  
7 IS NOT EVIDENCE. IF THE FACTS AS YOU REMEMBER THEM DIFFER  
8 FROM THE WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY OF THEM  
9 CONTROLS.

10 QUESTIONS AND OBJECTIONS BY LAWYERS ARE NOT EVIDENCE.  
11 ATTORNEYS HAVE A DUTY TO THEIR CLIENTS TO OBJECT WHEN THEY  
12 BELIEVE A QUESTION IS IMPROPER UNDER THE RULES OF EVIDENCE.  
13 YOU SHOULD NOT BE INFLUENCED BY THE OBJECTION OR BY THE  
14 COURT'S RULING ON IT.

15 TESTIMONY THAT HAS BEEN EXCLUDED OR STRICKEN, OR THAT YOU  
16 HAVE BEEN INSTRUCTED TO DISREGARD, IS NOT EVIDENCE AND MUST  
17 NOT BE CONSIDERED.

18 ANYTHING YOU MAY HAVE SEEN OR HEARD WHEN COURT WAS NOT IN  
19 SESSION IS NOT EVIDENCE. YOU ARE TO DECIDE THE CASE SOLELY ON  
20 THE EVIDENCE RECEIVED AT THE TRIAL.

21 EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL. DIRECT EVIDENCE  
22 IS DIRECT PROOF OF A FACT, SUCH AS TESTIMONY BY A WITNESS  
23 ABOUT WHAT THAT WITNESS PERSONALLY SAW OR HEARD OR  
24 DID. CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE FACTS FROM  
25 WHICH YOU COULD FIND ANOTHER FACT. YOU SHOULD CONSIDER BOTH

1 Kinds of evidence. The law makes no distinction between the  
2 weight to be given to either direct or circumstantial  
3 evidence. It is for you to decide how much weight to give to  
4 any evidence.

5 Before you decide that a fact has been proved by  
6 circumstantial evidence, you must consider all the evidence in  
7 the light of reason, experience and common sense.

8 There are rules of evidence that control what can be  
9 received into evidence. When a lawyer asked a question or  
10 offered an exhibit into evidence and a lawyer on the other  
11 side thought that it was not permitted by the rules of  
12 evidence, that lawyer may have objected. If I overruled the  
13 objection, the question was answered or the exhibit received.  
14 If I sustained the objection, the question was not answered,  
15 or the exhibit was not received. Whenever I sustain an  
16 objection to a question, you must ignore the question and must  
17 not guess what the answer might have been.

18 In deciding the facts in this case, you may have to decide  
19 which testimony to believe and which testimony not to believe.  
20 You may believe everything a witness says, or part of it, or  
21 none of it. Proof of a fact, or the weight of the evidence as  
22 to a fact, does not necessarily depend upon the number of  
23 witnesses who testify.

24 In considering the testimony of any witnesses, you may  
25 take into account:

1 ONE, THE OPPORTUNITY AND ABILITY OF THE WITNESS TO SEE OR  
2 HEAR OR KNOW THE THINGS TESTIFIED TO;

3 TWO, THE WITNESS' MEMORY;

4 THREE, THE WITNESS' MANNER WHILE TESTIFYING;

5 FOUR, THE WITNESS' INTEREST IN THE OUTCOME OF THE CASE AND  
6 ANY BIAS OR PREJUDICE;

7 FIVE, WHETHER OTHER EVIDENCE CONTRADICTED THE WITNESS'  
8 TESTIMONY;

9 SIX, WHETHER THE WITNESS GAVE DIFFERENT TESTIMONY ON A  
10 PRIOR OCCASION;

11 SEVEN, THE REASONABLENESS OF THE WITNESS' TESTIMONY IN  
12 LIGHT OF ALL THE EVIDENCE; AND

13 ANY OTHER FACTORS THAT BEAR ON BELIEVABILITY.

14 THE EVIDENCE THAT A WITNESS LIED UNDER OATH OR GAVE  
15 DIFFERENT TESTIMONY ON A PRIOR OCCASION MAY BE CONSIDERED,  
16 ALONG WITH ALL OTHER EVIDENCE, IN DECIDING WHETHER OR NOT TO  
17 BELIEVE THE WITNESS AND HOW MUCH WEIGHT TO GIVE THE TESTIMONY  
18 OF THE WITNESS AND FOR NO OTHER PURPOSE. IF YOU BELIEVE THAT  
19 A WITNESS TESTIFIED FALSELY CONCERNING ANY IMPORTANT MATTER,  
20 YOU MAY DISTRUST THE WITNESS' TESTIMONY CONCERNING OTHER  
21 MATTERS. YOU MAY REJECT ALL OF THE TESTIMONY OR YOU MAY  
22 ACCEPT SUCH PARTS OF THE TESTIMONY THAT YOU BELIEVE ARE TRUE  
23 AND GIVE IT SUCH WEIGHT AS YOU THINK IT DESERVES.

24 SOME WITNESSES, BECAUSE OF EDUCATION OR EXPERIENCE, ARE  
25 PERMITTED TO STATE OPINIONS AND THE REASONS FOR THOSE

1 OPINIONS. OPINION TESTIMONY SHOULD BE JUDGED JUST LIKE ANY  
2 OTHER TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT, AND GIVE IT  
3 AS MUCH WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE  
4 WITNESS' EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE  
5 OPINION, AND ALL THE OTHER EVIDENCE IN THE CASE.

6 DIGITAL REG'S EXPERT, DAMAGES EXPERT, MR. PARR, TESTIFIED  
7 THAT THE INTUIT LICENSE AGREEMENT HAD AN EFFECTIVE ROYALTY  
8 RATE OF 2.5 PERCENT BASED ON A DISCUSSION HE REPORTS HAVING  
9 WITH MR. FARLEY OF DIGITAL REG. THIS TESTIMONY MAY BE  
10 CONSIDERED SOLELY AS A BASIS FOR MR. PARR'S OPINION AND NOT AS  
11 SUBSTANTIVE EVIDENCE OF THAT RATE.

12 A DEPOSITION IS THE SWORN TESTIMONY OF A WITNESS TAKEN  
13 BEFORE TRIAL. THE WITNESS IS PLACED UNDER OATH TO TELL THE  
14 TRUTH AND LAWYERS FOR EACH PARTY MAY ASK QUESTIONS. THE  
15 QUESTIONS AND ANSWERS ARE RECORDED. THE COURT REPORTER TAKES  
16 CUSTODY OF THE DOCUMENTS THAT ARE DISCUSSED, ALTHOUGH THE  
17 PARTIES KEEP THEIR OWN COPIES. A COPY OF THE TRANSCRIPT IS  
18 MADE AVAILABLE TO THE WITNESS, WHO THEN HAS AN OPPORTUNITY TO  
19 MAKE CORRECTIONS.

20 YOU SHOULD CONSIDER DEPOSITION TESTIMONY, PRESENTED TO YOU  
21 IN COURT IN LIEU OF LIVE TESTIMONY, INsofar AS POSSIBLE, IN  
22 THE SAME WAY AS IF THE WITNESS HAD BEEN PRESENT TO TESTIFY.

23 BECAUSE YOU MUST BASE YOUR VERDICT ONLY ON THE EVIDENCE  
24 RECEIVED IN THE CASE AND ON THESE INSTRUCTIONS, I REMIND YOU  
25 THAT YOU MUST NOT BE EXPOSED TO ANY OTHER INFORMATION ABOUT



1 THE CASE OR ABOUT THE ISSUES IT INVOLVES. EXCEPT FOR  
2 DISCUSSING THE CASE WITH YOUR FELLOW JURORS DURING YOUR  
3 DELIBERATIONS:

4 DO NOT COMMUNICATE WITH ANYONE IN ANY WAY AND DO NOT LET  
5 ANYONE ELSE COMMUNICATE WITH YOU IN ANY WAY ABOUT THE MERITS  
6 OF THE CASE OR ANYTHING TO DO WITH IT. THIS INCLUDES  
7 DISCUSSING THE CASE IN PERSON, IN WRITING, BY PHONE OR  
8 ELECTRONIC MEANS, VIA EMAIL, TEXT MESSAGING, OR ANY INTERNET  
9 CHAT ROOM, BLOG, WEBSITE OR OTHER FEATURE. YOU MAY NOT  
10 COMMUNICATE ABOUT THE TRIAL WITH YOUR FAMILY MEMBERS OR YOUR  
11 EMPLOYER, ALTHOUGH YOU MAY INFORM THEM THAT YOU HAVE BEEN  
12 SEATED AS A JUROR IN THE CASE. YOU MAY NOT COMMUNICATE WITH  
13 THE PEOPLE INVOLVED IN THE TRIAL. IF YOU ARE ASKED OR  
14 APPROACHED IN ANY WAY ABOUT YOUR JURY SERVICE OR ABOUT  
15 ANYTHING ABOUT THIS CASE, YOU MUST RESPOND THAT YOU HAVE BEEN  
16 ORDERED NOT TO DISCUSS THE MATTER AND TO REPORT THE CONTACT TO  
17 THE COURT. YOU MAY COMMUNICATE WITH YOUR FELLOW JURORS  
18 PROVIDED THAT ALL THE JURORS ARE PRESENT FOR THE DISCUSSION  
19 AND THE DISCUSSION OCCURS IN THE JURY ROOM WITH THE DOOR  
20 CLOSED.

21 DO NOT READ, WATCH, OR LISTEN TO ANY NEWS OR MEDIA  
22 ACCOUNTS OR COMMENTARY ABOUT THE CASE OR ANYTHING TO DO WITH  
23 IT; DO NOT DO ANY RESEARCH, SUCH AS CONSULTING DICTIONARIES,  
24 SEARCHING THE INTERNET OR USING OTHER REFERENCE MATERIALS, AND  
25 DO NOT MAKE ANY INVESTIGATION OR IN ANY OTHER WAY TRY TO LEARN

1 ABOUT THE CASE ON YOUR OWN.

2 THE LAW REQUIRES THESE RESTRICTIONS TO ENSURE THAT THE  
3 PARTIES HAVE A FAIR TRIAL BASED ON THE SAME EVIDENCE THAT EACH  
4 PARTY HAS AN OPPORTUNITY TO ADDRESS. A JUROR WHO VIOLATES  
5 THESE RESTRICTIONS JEOPARDIZES THE FAIRNESS OF THESE  
6 PROCEEDINGS, AND A MISTRIAL COULD RESULT THAT WOULD REQUIRE  
7 THE ENTIRE TRIAL PROCESS TO START OVER. IF ANY JUROR IS  
8 EXPOSED TO ANY OUTSIDE INFORMATION, PLEASE NOTIFY THE COURT  
9 IMMEDIATELY.

10 I WILL NEXT GIVE YOU A SUMMARY OF EACH SIDE'S CONTENTIONS  
11 IN THIS CASE. I WILL THEN TELL YOU WHAT EACH SIDE MUST PROVE  
12 ON EACH OF ITS CONTENTIONS. AS I PREVIOUSLY TOLD YOU, DIGITAL  
13 REG SEEKS MONEY DAMAGES FROM ADOBE FOR ALLEGEDLY INFRINGING  
14 THE '541 PATENT AND THE '670 PATENT IN THAT ADOBE AND USERS OF  
15 ITS SOFTWARE PRACTICED METHODS CLAIMED IN DIGITAL REG'S  
16 PATENTS. THE ASSERTED CLAIMS ARE CLAIMS 1, 2, 4 AND 13 OF THE  
17 '541 PATENT, AND CLAIMS 45 AND 52 OF THE '670 PATENT. THE  
18 ACCUSED PRODUCTS ARE THE ADOBE FLASH PLATFORM, LIVECYCLE, AND  
19 SOFTWARE ACTIVATION SERVICES. DIGITAL REG ARGUES THAT ADOBE  
20 INFRINGED ITS PATENTS AND INDUCED INFRINGEMENT BY USERS OF  
21 THESE PRODUCTS. DIGITAL REG ALSO CONTENDS THAT ADOBE'S  
22 INFRINGEMENT OF THE '541 AND '670 PATENTS WAS WILLFUL.

23 ADOBE DENIES THAT IT HAS INFRINGED ANY OF THE ASSERTED  
24 CLAIMS OF THE '541 AND '670 PATENTS. ADOBE ARGUES THAT THE  
25 ASSERTED CLAIMS, ALONG WITH CLAIM 32 OF THE '670 PATENT, ARE

1       INVALID.

2               YOUR JOB IS TO DECIDE WHETHER THE ASSERTED CLAIMS OF THE  
3       '541 AND '670 PATENTS ARE VALID AND HAVE BEEN INFRINGED BY  
4       ADOBE'S ACCUSED PRODUCTS.

5               IF YOU DECIDE THAT ANY CLAIM OF THE ASSERTED PATENTS IS  
6       NOT INVALID AND HAS BEEN INFRINGED, THEN YOU WILL NEED TO  
7       DECIDE THE MONEY DAMAGES TO BE AWARDED TO DIGITAL REG TO  
8       COMPENSATE IT FOR THE INFRINGEMENT. YOU WILL ALSO NEED TO  
9       DECIDE WHETHER THE INFRINGEMENT WAS WILLFUL. IF YOU DECIDE  
10      THAT ANY INFRINGEMENT WAS WILLFUL, THAT DECISION SHOULD NOT  
11      AFFECT ANY DAMAGES AWARD THAT YOU GIVE. I WILL TAKE  
12      WILLFULNESS INTO ACCOUNT LATER.

13              AS I MENTIONED EARLIER, THE PATENT CLAIMS ARE NUMBERED  
14      SENTENCES AT THE END OF THE PATENT THAT DESCRIBE THE  
15      BOUNDARIES OF THE PATENT'S PROTECTION. IT IS MY JOB AS JUDGE  
16      TO EXPLAIN TO YOU THE MEANING OF ANY LANGUAGE IN THE CLAIMS  
17      THAT NEEDS INTERPRETATION.

18              I HAVE ALREADY DETERMINED THE MEANING OF CERTAIN TERMS OF  
19      THE CLAIMS OF THE '541 AND '670 PATENTS. ATTACHED TO THE  
20      WRITTEN COPY OF THE INSTRUCTIONS THAT YOU WILL BE GIVEN IS A  
21      DOCUMENT REFLECTING THOSE MEANINGS. YOU MUST ACCEPT THOSE  
22      INTERPRETATIONS AS CORRECT. HOWEVER, MY INTERPRETATION OF THE  
23      LANGUAGE OF THE CLAIMS SHOULD NOT BE TAKEN AS AN INDICATION  
24      THAT I HAVE A VIEW REGARDING ISSUES SUCH AS INFRINGEMENT AND  
25      INVALIDITY. THE DECISIONS REGARDING INFRINGEMENT AND

1        INVALIDITY ARE YOURS TO MAKE.

2            TO PROVE INFRINGEMENT OF ANY CLAIM, DIGITAL REG MUST  
3        PERSUADE YOU THAT IT IS MORE LIKELY THAN NOT THAT ADOBE  
4        INFRINGED THAT CLAIM. A PATENT'S CLAIMS DEFINE WHAT IS  
5        COVERED BY THE PATENT. YOU MUST DECIDE WHETHER ADOBE HAS USED  
6        WITHIN THE UNITED STATES A METHOD COVERED BY A CLAIM OF  
7        DIGITAL REG'S PATENTS. IF ADOBE HAS DONE SO, IT INFRINGES.

8            YOU MUST CONSIDER EACH OF THE ASSERTED CLAIMS OF THE  
9        PATENT INDIVIDUALLY, AND DECIDE WHETHER ADOBE PRACTICES EVERY  
10       REQUIREMENT OF THAT CLAIM. CLAIM 1 OF THE '541 PATENT, AND  
11       CLAIMS 32 AND 45 OF THE '670 PATENT, ARE KNOWN AS INDEPENDENT  
12       CLAIMS. INDEPENDENT CLAIMS CONTAIN A NUMBER OF REQUIREMENTS  
13       THAT MUST BE SATISFIED TO SHOW INFRINGEMENT. CLAIMS 2, 4, AND  
14       13 OF THE '541 PATENT, AND CLAIM 52 OF THE '670 PATENT ARE  
15       KNOWN AS DEPENDENT CLAIMS. A DEPENDENT CLAIM INCLUDES ALL OF  
16       THE REQUIREMENTS OF THE INDEPENDENT CLAIM TO WHICH IT REFERS,  
17       PLUS ADDITIONAL REQUIREMENTS OF ITS OWN. FOR EXAMPLE, CLAIM 2  
18       OF THE '541 PATENT INCORPORATES EVERY REQUIREMENT CONTAINED IN  
19       "THE METHOD OF CLAIM 1," BUT ALSO CONTAINS ADDITIONAL  
20       REQUIREMENTS THAT MUST BE SATISFIED TO FIND INFRINGEMENT OF  
21       CLAIM 2. AS A RESULT, IF YOU FIND THAT AN INDEPENDENT CLAIM  
22       IS NOT INFRINGED, YOU MUST ALSO FIND THAT ITS DEPENDENT CLAIMS  
23       ARE NOT INFRINGED AS WELL. ON THE OTHER HAND, IF YOU FIND  
24       THAT AN INDEPENDENT CLAIM HAS BEEN INFRINGED, YOU MUST STILL  
25       SEPARATELY DECIDE WHETHER THE ADDITIONAL REQUIREMENTS OF ITS

1 DEPENDENT CLAIMS HAVE ALSO BEEN INFRINGED.

2 THE CLAIMS AT ISSUE ARE METHOD CLAIMS. METHOD CLAIMS ARE  
3 ONLY INFRINGED WHEN THE CLAIMED PROCESS IS INFRINGED, NOT BY  
4 THE SALE OF THE APPARATUS THAT IS CAPABLE OF INFRINGING USE.

5 IN THIS CASE, DIGITAL REG ARGUES THAT ADOBE INFRINGED ITS  
6 PATENTS BOTH DIRECTLY AND INDIRECTLY. TO DECIDE WHETHER ADOBE  
7 DIRECTLY INFRINGES A CLAIM OF DIGITAL REG'S PATENTS, YOU MUST  
8 COMPARE ACTIONS BY ADOBE WITH THE PATENT CLAIM AND DETERMINE  
9 WHETHER EVERY REQUIREMENT OF THE CLAIM WAS CARRIED OUT BY  
10 ADOBE. IF SO, ADOBE DIRECTLY INFRINGES THAT CLAIM. WHETHER  
11 OR NOT ADOBE KNEW ITS PRODUCTS INFRINGED OR EVEN KNEW OF THE  
12 PATENT DOES NOT MATTER IN DETERMINING DIRECT INFRINGEMENT.

13 EVEN IF ADOBE DOES NOT ITSELF CARRY OUT EVERY REQUIREMENT  
14 IN THE PATENT CLAIM, ADOBE CANNOT ESCAPE LIABILITY FOR DIRECT  
15 INFRINGEMENT IF IT DIRECTED OR CONTROLLED OTHER PARTIES TO  
16 CARRY OUT THE MISSING REQUIREMENTS. ADOBE DOES NOT DIRECT OR  
17 CONTROL ANOTHER PARTIES' ACTIONS MERELY BECAUSE ADOBE ENTERED  
18 INTO A BUSINESS RELATIONSHIP WITH THAT PARTY. INSTEAD, ADOBE  
19 MUST SPECIFICALLY INSTRUCT OR CAUSE THAT OTHER PERSON TO  
20 PERFORM EACH STEP IN AN INFRINGING MANNER, SO THAT EVERY STEP  
21 IS ATTRIBUTABLE TO ADOBE AS THE CONTROLLING PARTY.

22 DIGITAL REG ALSO ALLEGES THAT ADOBE INDIRECTLY INFRINGED  
23 AND CONTINUES TO INDIRECTLY INFRINGE DIGITAL REG'S PATENTS BY  
24 INDUCING INFRINGEMENT. THE ACT OF ENCOURAGING OR INDUCING  
25 OTHERS TO INFRINGE A PATENT IS CALLED "INDUCING INFRINGEMENT."

1 IN ORDER FOR ADOBE TO INDUCE INFRINGEMENT, ONE OR MORE  
2 INDIVIDUALS OR COMPANIES, ACTING ALONE OR COLLECTIVELY, MUST  
3 DIRECTLY INFRINGE THE ASSERTED PATENT; IF THERE IS NO DIRECT  
4 INFRINGEMENT BY ANYONE, THERE CAN BE NO INDUCED INFRINGEMENT.  
5 IN ORDER TO BE LIABLE FOR INDUCEMENT OF INFRINGEMENT, ADOBE  
6 MUST HAVE:

7 ONE, INTENTIONALLY TAKEN ACTION THAT ACTUALLY INDUCED  
8 DIRECT INFRINGEMENT BY EACH INDIVIDUAL OR COMPANY;

9 TWO, BEEN AWARE OF THE ASSERTED PATENT;

10 THREE, KNOWN THAT THE ACTS IT WAS CAUSING WOULD BE  
11 INFRINGING;

12 AND, FOUR, NOT HAD A GOOD FAITH BELIEF THAT THE PATENT WAS  
13 INVALID.

14 THE KNOWLEDGE AND AWARENESS REQUIREMENTS FOR INDUCEMENT  
15 CAN BE SATISFIED BY SHOWING THAT ADOBE DEMONSTRATED DELIBERATE  
16 DISREGARD OR WAS WILLFULLY BLIND. IF ADOBE DID NOT KNOW OF  
17 THE EXISTENCE OF THE PATENT IN QUESTION OR THAT THE FACT -- OR  
18 THAT THE ACTS IT WAS INDUCING WERE INFRINGING, IT CAN BE  
19 LIABLE FOR INDUCEMENT ONLY IF IT ACTUALLY BELIEVED IT WAS  
20 HIGHLY PROBABLE ITS ACTIONS WOULD ENCOURAGE INFRINGEMENT OF A  
21 PATENT AND IT TOOK INTENTIONAL ACTS TO AVOID LEARNING THE  
22 TRUTH. IT IS NOT ENOUGH THAT ADOBE WAS MERELY INDIFFERENT TO  
23 THE POSSIBILITY THAT IT MIGHT ENCOURAGE INFRINGEMENT OF A  
24 PATENT. NOR IS IT ENOUGH THAT ADOBE TOOK A RISK THAT WAS  
25 SUBSTANTIAL AND UNJUSTIFIED.

1 IF YOU FIND THAT ADOBE WAS AWARE OF AN ASSERTED PATENT,  
2 BUT BELIEVED THAT THE ACTS IT ENCOURAGED DID NOT INFRINGE THAT  
3 PATENT, OR THAT THE PATENT WAS INVALID, THEN ADOBE CANNOT BE  
4 LIABLE FOR INDUCING INFRINGEMENT.

5 IN THIS CASE, AS I'VE MENTIONED, DIGITAL REG ARGUES THAT  
6 ADOBE WILLFULLY INFRINGED ITS PATENTS.

7 TO PROVE WILLFUL INFRINGEMENT, DIGITAL REG MUST FIRST  
8 PERSUADE YOU THAT ADOBE INFRINGED A CLAIM OF ITS PATENTS.

9 IN ADDITION, TO PROVE WILLFUL INFRINGEMENT, DIGITAL REG  
10 MUST PERSUADE YOU THAT IT IS HIGHLY PROBABLE THAT ADOBE ACTED  
11 WITH RECKLESS DISREGARD OF THE PATENT IT INFRINGED. THE STATE  
12 OF MIND OF ADOBE IS RELEVANT TO THIS INQUIRY. TO DEMONSTRATE  
13 SUCH RECKLESS DISREGARD, DIGITAL REG MUST PERSUADE YOU THAT  
14 ADOBE ACTUALLY KNEW, OR IT WAS SO OBVIOUS THAT ADOBE SHOULD  
15 HAVE KNOWN THAT ITS ACTIONS CONSTITUTED INFRINGEMENT OF A  
16 VALID PATENT.

17 IN DECIDING WHETHER ADOBE ACTED WITH RECKLESS DISREGARD  
18 FOR ANY PATENT THAT YOU FIND IS INFRINGED, YOU SHOULD CONSIDER  
19 ALL OF THE FACTS SURROUNDING THE ALLEGED INFRINGEMENT  
20 INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING FACTORS:

21 ONE, WHETHER ADOBE ACTED IN A MANNER CONSISTENT WITH THE  
22 STANDARDS OF COMMERCE FOR THE INDUSTRY.

23 ARE YOU OKAY?

24 TWO, WHETHER ADOBE INTENTIONALLY COPIED DIGITAL REG'S  
25 PATENT.

1 THREE, WHETHER ADOBE HAD A REASONABLE BASIS TO BELIEVE  
2 THAT IT DID NOT INFRINGE OR HAD A REASONABLE DEFENSE TO  
3 INFRINGEMENT.

4 WITH REGARD TO WILLFULNESS, DIGITAL REG CLAIMS, AMONG  
5 OTHER THINGS, THAT MR. VENTERS MET WITH ADOBE VENTURES IN THE  
6 SUMMER OF 2004 AND TOLD THEM ABOUT THE PATENTS. MR. VENTERS  
7 STATES THAT THE MEETING WAS NOT IN JUNE OF 2004, BUT RATHER  
8 SOMETIME LATER. MR. VENTERS TESTIFIED THAT HE SENT TO ADOBE  
9 VENTURES A DOCUMENT ENTITLED ADOBE VALUE PROPOSITION. SUCH A  
10 DOCUMENT WAS ADMITTED AS TRIAL EXHIBIT 125C. DIFFERENT DRAFTS  
11 OF THIS DOCUMENT EXIST, AND WHILE MR. VENTERS STATES A VERSION  
12 WAS SENT TO ADOBE VENTURES, HE CANNOT IDENTIFY THE PARTICULAR  
13 VERSION. THE INFORMATION MR. VENTERS STATES WAS SENT TO ADOBE  
14 VENTURES IS SET FORTH IN TRIAL EXHIBIT 696, WHICH WILL BE  
15 RECEIVED IN EVIDENCE IN PLACE OF TRIAL EXHIBIT 125C. ADOBE  
16 CONTENDS THAT THE CONFUSION OVER WHICH DOCUMENT WAS SENT AND  
17 WHEN SUPPORTS ITS PROPOSITION THAT THE EVIDENCE DOES NOT PROVE  
18 THAT ANY VERSION WAS SENT.

19 I WILL NOW INSTRUCT YOU ON THE RULES YOU MUST FOLLOW IN  
20 DECIDING WHETHER ADOBE HAS PROVEN THAT CLAIMS 1, 2, 4, AND 13  
21 OF THE '541 PATENT AND CLAIMS 32, 45 AND 52 OF THE '670 PATENT  
22 ARE INVALID. TO PROVE INVALIDITY OF ANY PATENT CLAIM, ADOBE  
23 MUST PERSUADE YOU BY CLEAR AND CONVINCING EVIDENCE THAT THE  
24 CLAIM IS INVALID.

25 DURING THIS CASE, ADOBE HAS SUBMITTED PRIOR ART, SOME OF



1 WHICH WAS AND SOME OF WHICH WAS NOT CONSIDERED BY THE UNITED  
2 STATES PATENT AND TRADEMARK OFFICE, OR PTO, DURING THE  
3 PROSECUTION OF THE '541 AND '670 PATENTS. ADOBE CONTENDS THAT  
4 THIS PRIOR ART INVALIDATES THE CLAIMS OF THE '541 AND '670  
5 PATENTS. IN DECIDING THE ISSUE OF INVALIDITY, YOU MAY TAKE  
6 INTO ACCOUNT WHETHER THE PRIOR ART WAS CONSIDERED BY THE PTO  
7 WHEN IT ISSUED THE '541 AND '670 PATENTS. PRIOR ART THAT  
8 DIFFERS FROM THE PRIOR ART CONSIDERED BY THE PTO MAY CARRY  
9 MORE WEIGHT THAN THE PRIOR ART THAT WAS CONSIDERED AND MAY  
10 MAKE ADOBE'S BURDEN OF SHOWING THAT IT IS HIGHLY PROBABLE THAT  
11 A PATENT CLAIM IS INVALID EASIER TO SUSTAIN.

12 A PATENT CLAIM IS INVALID IF ADOBE DEMONSTRATES THAT THE  
13 CLAIMED INVENTION IS NOT NEW. THE CLAIMED INVENTION IS NOT  
14 NEW IF THE PATENT'S REQUIREMENTS EXISTED IN A SINGLE DEVICE OR  
15 METHOD THAT PREDATES THE CLAIMED INVENTION, OR IF ALL OF ITS  
16 REQUIREMENTS WERE DESCRIBED IN A SINGLE PREVIOUS PUBLICATION  
17 OR PATENT THAT PREDATES THE CLAIMED INVENTION. IN PATENT LAW,  
18 THESE PREVIOUS DEVICES, METHODS, PUBLICATIONS OR PATENTS ARE  
19 CALLED "PRIOR ART REFERENCES." IF A PATENT CLAIM IS NOT NEW  
20 WE SAY IT IS "ANTICIPATED" BY A PRIOR ART REFERENCE.

21 THE DESCRIPTION IN THE WRITTEN REFERENCE DOES NOT HAVE TO  
22 BE IN THE SAME WORDS AS THE CLAIM, BUT ALL OF THE REQUIREMENTS  
23 OF THE CLAIM MUST BE THERE, THERE STATED OR NECESSARILY  
24 IMPLIED, SO THAT SOMEONE OF ORDINARY SKILL IN THE FIELD  
25 LOOKING AT THAT ONE REFERENCE WOULD BE ABLE TO MAKE AND USE

1 THE CLAIMED INVENTION.

2 HERE'S A LIST OF WAYS THAT ADOBE CAN SHOW THAT A PATENT  
3 CLAIM WAS NOT NEW:

4 ONE, THE CLAIMED INVENTION WAS ALREADY PUBLICLY KNOWN OR  
5 PUBLICLY USED BY OTHERS IN THE UNITED STATES BEFORE MAY 15TH,  
6 1997;

7 TWO, THE CLAIMED INVENTION WAS ALREADY PATENTED OR  
8 DESCRIBED IN A PRINTED PUBLICATION ANYWHERE IN THE WORLD  
9 BEFORE MAY 15TH, 1997. A REFERENCE IS A 'PRINTED PUBLICATION'  
10 IF IT IS ACCESSIBLE TO THOSE INTERESTED IN THE FIELD, EVEN IF  
11 IT IS DIFFICULT TO FIND;

12 THREE, THE CLAIMED INVENTION WAS ALREADY DESCRIBED IN  
13 ANOTHER UNITED STATES PATENT APPLICATION, OR A PUBLISHED  
14 PATENT THAT WAS BASED ON A PATENT APPLICATION FILED BEFORE  
15 MAY 15TH, 1997; OR

16 FOUR, THE CLAIMED INVENTION WAS ALREADY MADE BY SOMEONE  
17 ELSE IN THE UNITED STATES BEFORE MAY 15TH, 1997, IF THAT OTHER  
18 PERSON HAD NOT ABANDONED THE INVENTION OR KEPT IT SECRET.

19 NOT ALL INNOVATIONS ARE PATENTABLE. A PATENT CLAIM IS  
20 INVALID IF IT IS SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT  
21 THE CLAIMED INVENTION WOULD HAVE BEEN OBVIOUS TO A PERSON OF  
22 ORDINARY SKILL IN THE FIELD AT THE TIME OF THE INVENTION.

23 THIS MEANS THAT EVEN IF ALL OF THE REQUIREMENTS OF THE CLAIM  
24 CANNOT BE FOUND IN A SINGLE PRIOR ART REFERENCE, A PERSON OF  
25 ORDINARY SKILL IN THE FIELD WHO KNEW ABOUT ALL THIS PRIOR ART

1 WOULD HAVE COME UP WITH THE CLAIMED INVENTION.

2 THE ULTIMATE CONCLUSION OF WHETHER A CLAIM IS OBVIOUS  
3 SHOULD BE BASED UPON YOUR DETERMINATION OF SEVERAL FACTUAL  
4 DECISIONS:

5 ONE, THE LEVELS OF EDUCATION AND EXPERIENCE OF PERSONS  
6 WORKING IN THE FIELD;

7 TWO, THE TYPES OF PROBLEMS ENCOUNTERED IN THE FIELD;

8 THREE, THE SOPHISTICATION OF THE TECHNOLOGY.

9 FOUR, THE SCOPE AND CONTENT OF THE PRIOR ART; AND

10 FIVE, WHAT DIFFERENCES, IF ANY, EXISTED BETWEEN THE  
11 CLAIMED INVENTION AND THE PRIOR ART.

12 FINALLY, YOU SHOULD BE -- YOU SHOULD CONSIDER ANY OF THE  
13 FOLLOWING FACTORS THAT YOU FIND HAVE BEEN SHOWN BY THE  
14 EVIDENCE:

15 ONE, COMMERCIAL SUCCESS OF A PRODUCT DUE TO THE MERITS OF  
16 THE CLAIMED INVENTION;

17 TWO, A LONG FELT NEED FOR THE SOLUTION PROVIDED BY THE  
18 CLAIMED INVENTION;

19 THREE, UNSUCCESSFUL ATTEMPTS BY OTHERS TO FIND THE  
20 SOLUTION PROVIDED BY THE CLAIMED INVENTION;

21 FOUR, COPYING OF THE CLAIMED INVENTION BY OTHERS;

22 FIVE, UNEXPECTED AND SUPERIOR RESULTS FROM THE CLAIMED  
23 INVENTION;

24 SIX, ACCEPTANCE BY OTHERS OF THE CLAIMED INVENTION AS  
25 SHOWN BY PRAISE FROM OTHERS IN THE FIELD OR FROM THE LICENSING

1 OF THE CLAIMED INVENTION; AND

2 SIX, ANY OTHER EVIDENCE TENDING TO SHOW NONOBVIOUSNESS.

3 THE PRESENCE OF ANY OF THESE FACTORS MAY BE CONSIDERED BY  
4 YOU AS AN INDICATION THAT THE CLAIMED INVENTION WOULD NOT HAVE  
5 BEEN OBVIOUS AT THE TIME THE CLAIMED INVENTION WAS MADE. ON  
6 THE OTHER HAND, INDEPENDENT INVENTION OF THE CLAIMED INVENTION  
7 BY OTHERS BEFORE OR ABOUT THE SAME TIME AS THE NAMED INVENTOR  
8 THOUGHT OF IT, MAY BE CONSIDERED AS AN INDICATION THAT THE  
9 CLAIMED INVENTION WOULD HAVE BEEN OBVIOUS AT SUCH TIME.

10 ALTHOUGH YOU SHOULD CONSIDER ANY EVIDENCE OF THESE  
11 FACTORS, THE RELEVANCE AND IMPORTANCE OF ANY OF THEM IS UP TO  
12 YOU.

13 A PATENT CLAIM COMPOSED OF SEVERAL ELEMENTS IS NOT PROVED  
14 OBVIOUS MERELY BY DEMONSTRATING THAT EACH OF ITS ELEMENTS WAS  
15 INDEPENDENTLY PRESENT IN THE PRIOR ART. IN EVALUATING WHETHER  
16 SUCH A CLAIM WOULD HAVE BEEN OBVIOUS, YOU MAY CONSIDER WHETHER  
17 ADOBE HAS IDENTIFIED A REASON THAT WOULD HAVE PROMPTED A  
18 PERSON OF ORDINARY SKILL IN THE FIELD TO COMBINE THE ELEMENTS  
19 OR CONCEPTS FROM THE PRIOR ART IN THE SAME WAY AS IN THE  
20 CLAIMED INVENTION. THERE IS NO SINGLE WAY TO DEFINE THE LINE  
21 BETWEEN TRUE INVENTIVENESS ON THE ONE HAND, WHICH IS  
22 PATENTABLE, AND THE APPLICATION OF COMMON SENSE AND ORDINARY  
23 SKILL TO SOLVE A PROBLEM ON THE OTHER HAND WHICH IS NOT  
24 PATENTABLE. HOWEVER, YOU MUST BE CAREFUL NOT TO DETERMINE  
25 OBVIOUSNESS USING THE BENEFIT OF HINDSIGHT. SOMETIMES TRUE

1 INVENTIONS MIGHT SEEM OBVIOUS AFTER THE FACT. YOU SHOULD PUT  
2 YOURSELF IN THE POSITION OF A PERSON OF ORDINARY SKILL IN THE  
3 FIELD AT THE TIME THE CLAIMED INVENTION WAS MADE WHEN  
4 CONSIDERING WHETHER THE INVENTION WOULD HAVE BEEN OBVIOUS.

5 I WILL INSTRUCT YOU ABOUT THE MEASURE OF DAMAGES. BY  
6 INSTRUCTING YOU ON DAMAGES, I'M NOT SUGGESTING WHICH PARTY  
7 SHOULD WIN ON ANY ISSUE. IF YOU FIND THAT ADOBE INFRINGED ANY  
8 VALID AND ASSERTED CLAIM OF DIGITAL REG'S PATENTS, YOU MUST  
9 THEN DETERMINE THE AMOUNT OF MONEY DAMAGES TO BE AWARDED TO  
10 DIGITAL REG TO COMPENSATE IT FOR INFRINGEMENT BY THE USE OF  
11 ADOBE'S ACCUSED PRODUCTS.

12 THE AMOUNT OF THOSE DAMAGES MUST BE ADEQUATE TO COMPENSATE  
13 DIGITAL REG FOR THE INFRINGEMENT. A DAMAGES AWARD SHOULD PUT  
14 THE PATENT HOLDER IN APPROXIMATELY THE FINANCIAL POSITION IT  
15 WOULD HAVE BEEN IN HAD THE INFRINGEMENT NOT OCCURRED, BUT IN  
16 NO EVENT MAY THE DAMAGES AWARD BE LESS THAN A REASONABLE  
17 ROYALTY. YOU SHOULD KEEP IN MIND THAT THE DAMAGES YOU AWARD  
18 ARE MEANT TO COMPENSATE THE PATENT HOLDER AND NOT TO PUNISH AN  
19 INFRINGER. DIGITAL REG HAS THE BURDEN TO PERSUADE YOU OF THE  
20 AMOUNT OF ITS DAMAGES. YOU SHOULD AWARD ONLY THOSE DAMAGES  
21 THAT DIGITAL REG MORE LIKELY THAN NOT SUFFERED. WHILE DIGITAL  
22 REG IS NOT REQUIRED TO PROVE ITS DAMAGES WITH MATHEMATICAL  
23 PRECISION, IT MUST PROVE THEM WITH REASONABLE CERTAINTY.  
24 DIGITAL REG IS NOT ENTITLED TO DAMAGES THAT ARE REMOTE OR  
25 SPECULATIVE.

1           IN THIS CASE, DIGITAL REG SEEKS TO RECOVER A REASONABLE  
2 ROYALTY BASED ON ADOBE'S ALLEGED INFRINGEMENT OF THE ASSERTED  
3 CLAIMS. DIGITAL REG SHOULD BE AWARDED AT LEAST A REASONABLE  
4 ROYALTY CONSIDERING THE USE OF ADOBE'S PRODUCTS TO PRACTICE  
5 THE ASSERTED CLAIMS.

6           A ROYALTY IS A PAYMENT MADE TO A PATENT HOLDER IN EXCHANGE  
7 FOR THE RIGHT TO USE THE CLAIMED INVENTION. THIS RIGHT IS  
8 CALLED A "LICENSE." A REASONABLE ROYALTY IS THE PAYMENT FOR  
9 THE LICENSE THAT WOULD HAVE RESULTED FROM A HYPOTHETICAL  
10 NEGOTIATION BETWEEN THE PATENT HOLDER AND THE INFRINGER TAKING  
11 PLACE AT THE TIME THE INFRINGING ACTIVITY FIRST BEGAN.

12           IN CONSIDERING THE NATURE OF THIS NEGOTIATION, YOU MUST  
13 ASSUME THAT THE PATENT HOLDER AND THE INFRINGER WOULD HAVE  
14 ACTED REASONABLY AND WOULD HAVE ENTERED INTO A LICENSE  
15 AGREEMENT. YOU MUST ALSO ASSUME THAT BOTH PARTIES BELIEVED  
16 THE PATENT WAS VALID AND INFRINGED. YOUR ROLE IS TO DETERMINE  
17 WHAT THE RESULT OF THAT NEGOTIATION WOULD HAVE BEEN. THE TEST  
18 FOR DAMAGES IS WHAT ROYALTY WOULD HAVE RESULTED FROM THE  
19 HYPOTHETICAL NEGOTIATION AND NOT SIMPLY WHAT EITHER PARTY  
20 WOULD HAVE PREFERRED.

21           A ROYALTY CAN BE CALCULATED IN SEVERAL DIFFERENT WAYS AND  
22 IT IS FOR YOU TO DETERMINE WHICH WAY IS THE MOST APPROPRIATE  
23 BASED ON THE EVIDENCE THAT YOU'VE HEARD. ONE WAY TO CALCULATE  
24 A ROYALTY IS TO DETERMINE WHAT IS CALLED AN "ONGOING ROYALTY."  
25 TO CALCULATE AN ONGOING ROYALTY, YOU MUST FIRST DETERMINE THE

1 "BASE," THAT IS, THE USE ON WHICH ADOBE IS TO PAY. YOU THEN  
2 NEED TO MULTIPLY THE REVENUE ADOBE OBTAINED FROM THAT BASE BY  
3 THE "RATE" OR PERCENTAGE THAT YOU FIND WOULD HAVE RESULTED  
4 FROM THE HYPOTHETICAL NEGOTIATION.

5 ALTHOUGH THERE IS NO RIGID REQUIREMENT THAT DAMAGES IN ALL  
6 CIRCUMSTANCES BE LIMITED TO SPECIFIC INSTANCES OF INFRINGEMENT  
7 PROVEN WITH DIRECT EVIDENCE, THE DAMAGES AWARD MUST BE  
8 CORRELATED TO THE EXTENT THE INFRINGING METHOD IS USED BY  
9 CONSUMERS, BECAUSE THAT IS WHAT THE PARTIES TO THE  
10 HYPOTHETICAL NEGOTIATION WOULD HAVE CONSIDERED. IF PARTICULAR  
11 PRODUCTS SOLD BY ADOBE ARE NEVER ENABLED TO BE USED IN AN  
12 INFRINGING MANNER, THERE IS NO INFRINGEMENT AND SUCH UNITS OF  
13 PRODUCT SHOULD NOT BE INCLUDED IN THE ROYALTY BASE.

14 IF THE PATENT COVERS ONLY PART OF THE PRODUCT THAT THE  
15 INFRINGERS SELLS, THEN THE BASE WOULD NORMALLY BE ONLY THAT  
16 FEATURE OR COMPONENT. FOR EXAMPLE, IF YOU FIND THAT FOR A  
17 THOUSAND DOLLAR CAR THE PATENTED FEATURE IS THE TIRES, WHICH  
18 SELL FOR \$50, THE BASE REVENUE WOULD \$50. HOWEVER, IN A  
19 CIRCUMSTANCE IN WHICH THE PATENTED FEATURE IS THE REASON THE  
20 CUSTOMERS BUY THE WHOLE PRODUCT, THE BASE REVENUE COULD BE THE  
21 VALUE OF THE WHOLE PRODUCT. EVEN IF THE PATENTED FEATURE IS  
22 NOT THE REASON FOR CUSTOMER DEMAND, THE VALUE OF THE WHOLE  
23 PRODUCT COULD BE USED IF, FOR EXAMPLE, THE VALUE OF THE  
24 PATENTED FEATURE COULD NOT BE SEPARATED OUT FROM THE VALUE OF  
25 THE WHOLE PRODUCT. IN SUCH A CASE, HOWEVER, THE RATE

1        RESULTING FROM THE HYPOTHETICAL NEGOTIATION WOULD BE A LOWER  
2        RATE BECAUSE IT IS BEING APPLIED TO THE VALUE OF THE WHOLE  
3        PRODUCT AND THE PATENTED FEATURE IS NOT THE REASON FOR THE  
4        CUSTOMER'S PURCHASE OF THE WHOLE PRODUCT.

5            ANOTHER WAY TO CALCULATE A ROYALTY IS TO DETERMINE A  
6        ONE-TIME LUMP SUM PAYMENT THAT THE INFRINGER WOULD HAVE PAID  
7        AT THE TIME OF THE HYPOTHETICAL NEGOTIATION FOR A LICENSE  
8        COVERING ALL USES. THIS DIFFERS FROM THE PAYMENT OF AN  
9        ONGOING ROYALTY, BECAUSE WITH AN ONGOING ROYALTY THE LICENSEE  
10       PAYS BASED ON THE REVENUE OF ACTUAL LICENSED USE. WHEN A  
11       ONE-TIME LUMP SUM IS PAID, THE INFRINGER PAYS A SINGLE PRICE  
12       FOR A LICENSE COVERING BOTH PAST AND FUTURE INFRINGING USE.

13            IN DETERMINING A REASONABLE ROYALTY, YOU MAY CONSIDER, BUT  
14        ARE NOT LIMITED TO, THE FOLLOWING FACTORS:

15            ONE, THE ROYALTIES RECEIVED BY DIGITAL REG FOR THE  
16        LICENSING OF THE PATENT-IN-SUIT, PROVING OR TENDING TO PROVE  
17        AN ESTABLISHED ROYALTY;

18            TWO, THE RATES PAID BY ADOBE FOR THE USE OF OTHER PATENTS  
19        COMPARABLE TO THE PATENTS-IN-SUIT;

20            THREE, THE NATURE AND SCOPE OF THE LICENSE, AS EXCLUSIVE  
21        OR NONEXCLUSIVE, OR AS RESTRICTED OR NONRESTRICTED IN TERMS OF  
22        TERRITORY OR WITH RESPECT TO WHOM THE MANUFACTURED PRODUCT MAY  
23        BE SOLD;

24            FOUR, DIGITAL REG'S ESTABLISHED POLICY AND MARKETING  
25        PROGRAM TO MAINTAIN ITS PATENT MONOPOLY BY NOT LICENSING



1 OTHERS TO USE THE INVENTION OR BY GRANTING LICENSES UNDER  
2 SPECIAL CONDITIONS DESIGNED TO PRESERVE THAT MONOPOLY;

3 FIVE, THE COMMERCIAL RELATIONSHIP BETWEEN DIGITAL REG AND  
4 ADOBE, SUCH AS WHETHER THEY ARE COMPETITORS IN THE SAME  
5 TERRITORY IN THE SAME LINE OF BUSINESS, OR WHETHER THEY ARE  
6 INVENTOR AND PROMOTER;

7 SIX, THE EFFECT OF SELLING THE PATENTED SPECIALTY IN  
8 PROMOTING SALES OF OTHER PRODUCTS OF ADOBE, THE EXISTING VALUE  
9 OF THE INVENTION TO DIGITAL REG AS A GENERATOR OF SALE --  
10 SALES OF ITS NONPATENTED ITEMS, AND THE EXTENT OF WHICH -- THE  
11 EXTENT OF SUCH DERIVATIVE OR CONVOYED SALES;

12 SEVEN, THE DURATION OF THE PATENT AND THE TERM OF THE  
13 LICENSE;

14 EIGHT, THE ESTABLISHED PROFITABILITY OF THE PRODUCT MADE  
15 UNDER THE PATENTS, ITS COMMERCIAL SUCCESS, AND ITS CURRENT  
16 POPULARITY;

17 NINE, THE UTILITY AND ADVANTAGES OF THE PATENTED PROPERTY  
18 OVER THE OLD MODES OR DEVICES, IF ANY, THAT HAD BEEN USED FOR  
19 WORKING OUT SIMILAR RESULTS;

20 TEN, THE NATURE OF THE PATENTED INVENTION, THE CHARACTER  
21 OF THE COMMERCIAL EMBODIMENT OF IT AS OWNED AND PRODUCED BY  
22 DIGITAL REG, AND THE BENEFITS TO THOSE WHO HAVE USED THE  
23 INVENTION;

24 ELEVEN, THE EXTENT TO WHICH ADOBE HAS MADE USE OF THE  
25 INVENTION, OR ANY EVIDENCE PROBATIVE OF THE VALUE OF THAT USE;

1 TWELVE, THE PORTION OF THE PROFIT OR OF THE SELLING PRICE  
2 THAT MAY BE CUSTOMARY IN THE PARTICULAR BUSINESS OR IN  
3 COMPARABLE BUSINESSES TO ALLOW FOR THE USE OF THE INVENTION OR  
4 ANALOGOUS INVENTIONS;

5 THIRTEEN, THE PORTION OF THE REALIZABLE PROFITS THAT  
6 SHOULD BE CREDITED TO THE INVENTION AS DISTINGUISHED FROM  
7 NONPATENTED ELEMENTS, THE MANUFACTURING PROCESS, BUSINESS  
8 RISKS, OR SIGNIFICANT FEATURES OR IMPROVEMENTS ADDED BY THE  
9 INFRINGER;

10 FOURTEEN, THE OPINION AND TESTIMONY OF QUALIFIED EXPERTS;

11 FIFTEEN, THE AMOUNT THAT DIGITAL REG AND ADOBE WOULD HAVE  
12 AGREED UPON AT THE TIME THE INFRINGEMENT BEGAN IF BOTH HAD  
13 BEEN REASONABLY AND VOLUNTARILY TRYING TO REACH AN AGREEMENT;  
14 THAT IS, THE AMOUNT WHICH A PRUDENT LICENSEE -- WHO DESIRED,  
15 AS A BUSINESS PROPOSITION, TO OBTAIN A LICENSE TO MANUFACTURE  
16 AND SELL A PARTICULAR ARTICLE EMBODYING THE PATENTED  
17 INVENTION -- WOULD HAVE BEEN WILLING TO PAY AS A ROYALTY AND  
18 YET BE ABLE TO MAKE A REASONABLE PROFIT AND WHICH AMOUNT WOULD  
19 HAVE BEEN ACCEPTABLE BY A PRUDENT PATENTEE WHO WAS WILLING TO  
20 GRANT A LICENSE.

21 YOU CAN CONSIDER EVENTS AND CIRCUMSTANCES THAT OCCURRED  
22 BEFORE AND AFTER THE TIME OF THE HYPOTHETICAL NEGOTIATION  
23 BETWEEN DIGITAL REG AND ADOBE TO DETERMINE A REASONABLE  
24 ROYALTY. IT IS UP TO YOU, BASED ON THE EVIDENCE, TO DECIDE  
25 WHAT TYPE OF ROYALTY IS APPROPRIATE IN THIS CASE.

1 IF YOU FIND THAT ADOBE INDUCED INFRINGEMENT, RATHER THAN  
2 DIRECTLY INFRINGED, THEN YOU MUST MAKE A NUMBER OF ADDITIONAL  
3 FINDINGS BEFORE DAMAGES MAY BE AWARDED.

4 IN ORDER TO RECOVER DAMAGES FOR INDUCED INFRINGEMENT,  
5 DIGITAL REG MUST EITHER PROVE THAT THE METHODS PRACTICED BY  
6 ADOBE'S ACCUSED PRODUCTS NECESSARILY INFRINGE AT LEAST ONE OF  
7 DIGITAL REG'S PATENTS, OR PROVE ACTS OF DIRECT INFRINGEMENT BY  
8 OTHERS THAT WERE INDUCED BY ADOBE. BECAUSE THE AMOUNT OF  
9 DAMAGES FOR INDUCED INFRINGEMENT IS LIMITED BY THE NUMBER OF  
10 INSTANCES OF DIRECT INFRINGEMENT, DIGITAL REG MUST FURTHER  
11 PROVE THE NUMBER OF DIRECT ACTS OF INFRINGEMENT OF AT LEAST  
12 ONE OF DIGITAL REG'S PATENTS, FOR EXAMPLE, BY SHOWING  
13 INDIVIDUAL ACTS OF DIRECT INFRINGEMENT OR BY SHOWING THAT A  
14 PARTICULAR CLASS OF USES DIRECTLY INFRINGES.

15 I WILL GIVE YOU A FEW MORE INSTRUCTIONS ABOUT HOW TO  
16 CONDUCT YOUR DELIBERATIONS AFTER WE HAVE HEARD THE CLOSING  
17 ARGUMENT. BUT WHAT I WILL DO BEFORE THE ARGUMENT IS TO READ  
18 TO YOU THE VERDICT FORM THAT YOU WILL BE GIVEN TO TELL YOU  
19 WHAT QUESTIONS YOU WILL BE ASKED TO ANSWER, SO YOU WILL BE  
20 ABLE TO FOLLOW ALONG DURING THE CLOSING ARGUMENT.

21 WE, THE JURY, IN THE ABOVE-ENTITLED ACTION RETURN THE  
22 FOLLOWING VERDICT ON THE QUESTIONS SUBMITTED TO US.

23 FIRST, INFRINGEMENT.

24 QUESTION ONE: DIRECT INFRINGEMENT. HAS DIGITAL REG  
25 PROVEN IT IS MORE LIKELY THAN NOT THAT ADOBE HAS INFRINGED ANY

1 OF THE FOLLOWING CLAIMS? ENTER "YES" OR "NO" IN EACH BOX.

2 THEN, YOU WILL SEE A CHART WHICH WILL HAVE THE DECISIONS  
3 YOU HAVE TO MAKE. FIRST WILL BE THE ADOBE ACTIVATION PRODUCT  
4 AND WHETHER IT IS DIRECTLY INFRINGED BY CLAIM 45, THE  
5 INDEPENDENT CLAIM OF THE '670 PATENT.

6 NEXT, UNDER INFRINGEMENT, DIRECT INFRINGEMENT, YOU WILL BE  
7 ASKED ABOUT THE ADOBE LIVECYCLE PRODUCT. AND YOU WILL BE  
8 ASKED WHETHER OF THE '670 PATENT, CLAIM 5 -- I AM SORRY --  
9 CLAIM 45, THE INDEPENDENT CLAIM IS INFRINGED, WHETHER  
10 CLAIM 52, DEPENDENT ON CLAIM 45, IS DIRECTLY INFRINGED.

11 NEXT, YOU WILL BE ASKED ABOUT INDIRECT INFRINGEMENT. HAS  
12 DIGITAL REG PROVEN IT IS MORE LIKELY THAN NOT THAT ADOBE  
13 INDIRECTLY INFRINGED ANY OF THE FOLLOWING CLAIMS?

14 ENTER "YES" OR "NO" IN EACH BOX. AND THERE YOU WILL BE  
15 ASKED, AGAIN, ABOUT ADOBE ACTIVATION PRODUCT, BUT YOU WILL BE  
16 ASKED ABOUT THE '541 PATENT, CLAIM 1, THE INDEPENDENT CLAIM,  
17 CLAIM 2, DEPENDENT ON CLAIM 1, CLAIM 4, ALSO DEPENDENT ON  
18 CLAIM 1, AND CLAIM 13, ALSO DEPENDENT ON CLAIM 1.

19 THEN, YOU WILL BE ASKED AGAIN ABOUT THE '670 PATENT,  
20 CLAIM 45, THE INDEPENDENT CLAIM.

21 THEN, YOU WILL BE ASKED ABOUT ADOBE FLASH. AND YOU WILL  
22 BE ASKED ABOUT THE '541 PATENT, CLAIM 1, THE INDEPENDENT  
23 CLAIM, CLAIM 2, DEPENDENT ON CLAIM 1, CLAIM 4, ALSO DEPENDENT  
24 ON CLAIM 1, CLAIM 13, ALSO DEPENDENT ON CLAIM 1.

25 THEN, YOU WILL BE ASKED ABOUT THE ADOBE LIVECYCLE PRODUCT.

1 AND YOU WILL BE ASKED TO ANSWER "YES" OR "NO" ABOUT THE '541  
2 PATENT, CLAIM 1, THE INDEPENDENT CLAIM, CLAIMS 2, 4, AND 13,  
3 THE DEPENDENT CLAIMS, DEPENDENT ON CLAIM 1, CLAIMS 45, THE  
4 INDEPENDENT CLAIM OF THE '670 PATENT, AND CLAIM 52, THE  
5 DEPENDENT CLAIM OF CLAIM 45 OF THE '670 PATENT DEPENDENT ON  
6 CLAIM 45.

7 NEXT, YOU WILL BE ASKED ABOUT INVALIDITY. UNDER  
8 INVALIDITY YOU WILL BE FIRST ASKED ABOUT ANTICIPATION. HAS  
9 ADOBE PROVEN THAT IT IS HIGHLY PROBABLE THAT THE FOLLOWING  
10 CLAIMS OF DIGITAL REG'S PATENTS WERE ANTICIPATED? OR, IN  
11 OTHER WORDS, NOT NEW.

12 ANSWER "YES" OR "NO" IN EACH BOX. SO THEN YOU WILL BE  
13 ASKED ABOUT ANTICIPATED, AND YOU WILL BE ASKED ABOUT THE '670  
14 PATENT, CLAIM 32, AN INDEPENDENT CLAIM, CLAIM 45, AN  
15 INDEPENDENT CLAIM, AND CLAIM 52, DEPENDENT ON CLAIM 45.

16 NEXT, YOU WILL BE ASKED QUESTIONS ABOUT OBVIOUSNESS. HAS  
17 ADOBE PROVEN THAT IT IS HIGHLY PROBABLE THAT THE FOLLOWING  
18 CLAIMS OF DIGITAL REG'S PATENTS WOULD HAVE BEEN OBVIOUS TO A  
19 PERSON OF ORDINARY SKILL IN THE FIELD AT THE TIME THE PATENT  
20 APPLICATION WAS FILED? ANSWER "YES" OR "NO" IN EACH BOX.

21 OBVIOUS, FIRST THE '541 PATENT. CLAIM 1, THE INDEPENDENT  
22 CLAIM, CLAIM 2, 4 AND 13, CLAIMS THAT ARE DEPENDENT ON  
23 CLAIM 1, AND THE '670 PATENT, CLAIM 32, AN INDEPENDENT CLAIM,  
24 CLAIM 45, AN INDEPENDENT CLAIM, AND CLAIM 52, A CLAIM THAT'S  
25 DEPENDENT ON CLAIM 45.

1            THEN, YOU WILL BE TOLD IF YOU FOUND THAT AT LEAST ONE  
2            PRODUCT INFRINGES AT LEAST ONE VALID PATENT CLAIM, THAT IS,  
3            THAT YOU ANSWERED "YES" AS TO INFRINGEMENT OF A PARTICULAR  
4            CLAIM BY A PRODUCT IN EITHER QUESTION ONE OR TWO, AND YOU  
5            ANSWERED "NO" AS TO EACH OF THE INVALIDITY DEFENDANTS  
6            REGARDING THAT CLAIM IN QUESTIONS THREE, FOUR AND FIVE, THEN  
7            YOU WILL PROCEED TO ANSWER QUESTIONS SIX AND SEVEN.

8            IF YOU HAVEN'T FOUND THAT ANY PARTICULAR CLAIM IS BOTH  
9            NONVALID AND INFRINGED, THEN YOU WON'T ANSWER THESE DAMAGES  
10            QUESTIONS. BUT IF YOU DO FIND THAT, THEN YOU WILL ANSWER  
11            THESE QUESTIONS, AND THAT IS DAMAGES.

12            REASONABLE ROYALTY. FOR THE CLAIMS THAT YOU FOUND VALID  
13            AND INFRINGED BY ADOBE'S ACCUSED PRODUCTS, WHAT ROYALTY AMOUNT  
14            HAS DIGITAL REG PROVEN THAT IT SHOULD HAVE RECEIVED FROM  
15            ADOBE? AND THEN, YOU WILL ANSWER EITHER A, EITHER AN ONGOING  
16            ROYALTY PAYMENT OF ROYALTY RATE BLANK PERCENT. AND THERE YOU  
17            WILL ENTER AN APPROPRIATE ROYALTY RATE, IF YOU FIND ONE, TIMES  
18            ROYALTY BASE: DOLLAR SIGNAL, BLANK.

19            AND THAT WILL BE THE AMOUNT OF THE ROYALTY BASE UPON WHICH  
20            YOU DECIDE THE ROYALTY SHOULD BE BASED. AND THEN, YOU WILL  
21            MULTIPLY THE RATE, THE PERCENTAGE, TIMES THE BASE, THE NUMBER,  
22            AND REACH A DAMAGES AWARD: DOLLAR SIGN, BLANK.

23            THAT'S THE ONGOING ROYALTY. OR INSTEAD, YOU MAY ANSWER B,  
24            A ONE-TIME PAYMENT OF: DOLLAR SIGN, BLANK. AND THERE YOU  
25            WOULD ENTER INSTEAD A LUMP SUM AMOUNT, IF YOU FIND THAT THAT

1 IS APPROPRIATE.

2 NEXT, IF YOU GET TO THIS POINT YOU WILL ANSWER THE  
3 WILLFULNESS QUESTION, WHICH WILL ASK YOU: HAS DIGITAL REG  
4 PROVEN THAT IT IS HIGHLY PROBABLE THAT ADOBE ACTUALLY KNEW OR  
5 THE EVIDENCE WAS SO OBVIOUS THAT ADOBE SHOULD HAVE KNOWN THAT  
6 ITS ACTIONS CONSTITUTED INFRINGEMENT OF A VALID AND  
7 ENFORCEABLE PATENT?

8 YOU WILL ANSWER THAT "YES" OR "NO." AND THEN, YOU WILL  
9 RETURN YOUR VERDICT.

10 SO AT THIS TIME WE WILL HEAR, FIRST, CLOSING ARGUMENT FROM  
11 PLAINTIFF. THEN, WE WILL HEAR CLOSING ARGUMENT FROM  
12 DEFENDANT, WHICH WILL BE SHARED BETWEEN TWO OF THE ATTORNEYS.  
13 AND THEN, WE GO BACK TO THE PLAINTIFF FOR A REBUTTAL, SHORT  
14 FINAL CLOSING ARGUMENT.

15 WE WILL TAKE A BREAK IN-BETWEEN THE PLAINTIFF'S OPEN AND  
16 CLOSE AND THE DEFENDANTS' CLOSE. SO YOU MAY ARGUE. AND YOU  
17 MAY TURN THAT PODIUM, IF YOU WOULD LIKE.

18 **THE CLERK:** WILL YOU ALSO BE USING THE MONITORS?

19 **MR. ELLWANGER:** YES.

20 **CLOSING ARGUMENT**

21 **MR. ELLWANGER:** ADOBE PROTECTS ITS OWN PROPERTY WITH  
22 STOLEN PROPERTY.

23 **THE COURT:** NOT LOUD ENOUGH, I'M AFRAID. OR IF YOU  
24 ARE USING THE MIC, IT IS NOT CLOSE ENOUGH, NOT LOUD ENOUGH OR  
25 NOT ON.

1           **MR. ELLWANGER:** IS THIS BETTER?

2           **THE COURT:** YES.

3           **MR. ELLWANGER:** ADOBE PROTECTS ITS OWN PROPERTY WITH  
4       STOLEN PROPERTY. THOSE WERE THE FIRST WORDS YOU HEARD ABOUT  
5       THIS CASE A WEEK-AND-A-HALF AGO. AND AT THE TIME YOU MIGHT  
6       HAVE THOUGHT THAT I WAS TALKING ABOUT SOME MISCREANT, TO  
7       BORROW DR. DEVANBU'S PHRASE. A MISCREANT THAT HAD CRAWLED  
8       THROUGH SOME WINDOW AND TOOK SOME SOFTWARE.

9           BUT I WASN'T TALKING ABOUT THAT, BECAUSE PATENT  
10       INFRINGEMENT IS MORE COMPLICATED THAN THAT. IT'S ABOUT TAKING  
11       IDEAS AND USING THOSE IDEAS AND NOT PAYING FOR THOSE IDEAS.  
12       AND THAT'S WHAT THE EVIDENCE HAS SHOWN HAPPENED HERE.

13          NOW, I'M NOT GOING TO TAKE YOUR TIME GOING THROUGH THE  
14       TESTIMONY OF EVERY SINGLE WITNESS AND EVERY SINGLE DOCUMENT  
15       THAT HAS BEEN ADMITTED INTO THIS CASE. BUT I DO WANT TO TAKE  
16       THE TIME TO TALK TO YOU ABOUT SOME EVIDENCE THAT'S IN THE  
17       RECORD, BUT THAT YOU HAVEN'T HAD A CHANCE TO LOOK AT YET AND  
18       CONSIDER.

19          AND I ALSO WANT TO TAKE THE OPPORTUNITY TO CONNECT THE  
20       DOTS BETWEEN SOME OF THE EVIDENCE THAT YOU HAVE SEEN AND THE  
21       JURY VERDICT THAT THE COURT JUST INSTRUCTED YOU ABOUT, AND  
22       THAT WHEN YOU GO BACK IN THAT ROOM THAT YOU WILL HAVE TO FILL  
23       OUT.

24          AND THE FIRST THING THAT I WANT TO TALK ABOUT IS  
25       WILLFULNESS. IN ORDER TO PROVE WILLFULNESS, THE COURT'S



1 INSTRUCTED THAT TO PROVE WILLFUL INFRINGEMENT DIGITAL REG MUST  
2 PERSUADE YOU THAT IT IS HIGHLY PROBABLE THAT ADOBE ACTED WITH  
3 RECKLESS DISREGARD OF THE PATENT IT INFRINGED.

4 TO DEMONSTRATE SUCH RECKLESS DISREGARD DIGITAL REG MUST  
5 PERSUADE YOU THAT ADOBE ACTUALLY KNEW, OR IT WAS SO OBVIOUS  
6 THAT ADOBE SHOULD HAVE KNOWN THAT ITS ACTIONS CONSTITUTED  
7 INFRINGEMENT OF A VALID PATENT.

8 AND I WANT TO WALK YOU THROUGH SOME OF ADOBE'S PATENTS  
9 THAT THEY HAVE AND THE PROSECUTION HISTORIES, WHICH ARE THE  
10 FILES THAT GO BACK AND FORTH BETWEEN THE APPLICANT AND THE  
11 UNITED STATES PATENT OFFICE.

12 NOW, I'M NOT SAYING ADOBE DIDN'T DESERVE THESE PATENTS OR  
13 THEY WEREN'T ULTIMATELY GRANTED; THAT THEY FIGURED OUT HOW TO  
14 PUT THE ERASER AT THE END OF THE PENCIL. BUT I DO WANT TO  
15 TALK ABOUT THE NOTICE THAT THEY SHOW ADOBE WAS UNDER OF THE  
16 '541 AND THE '670 PATENT.

17 NOW, IN ORDER TO DO THAT, I WANT TO BRING UP THE FIRST  
18 SLIDE.

19 THANK YOU, MS. MASON.

20 AT FIRST, I WANT TO TALK TO YOU ABOUT UNITED STATES PATENT  
21 '384. IT IS PLAINTIFF'S EXHIBIT 6. AND THIS PATENT, AS  
22 YOU'LL SEE, IS ASSIGNED TO ADOBE. AND ON THE VERY FACE OF  
23 THIS PATENT YOU'LL SEE THE PATTERSON PATENT '541 THAT'S  
24 INDICATED AS ONE OF THE PATENTS THAT THE PATENT OFFICE POINTED  
25 OUT TO ADOBE AS BEING RELEVANT TO THIS ADOBE PATENT.

1           AND YOU CAN TELL THAT BECAUSE OF THAT ASTERISK RIGHT THERE  
2           NEXT TO THE PATENT NUMBER. IT SAYS: "CITED BY EXAMINER."

3           NOW, AS WE GO THROUGH THIS PROSECUTION HISTORY YOU WILL  
4           SEE THAT THIS '541 PATENT WASN'T JUST MENTIONED, THAT, IN  
5           FACT, A NUMBER OF THE CLAIMS STOOD REJECTED AS UNPATENTABLE IN  
6           VIEW OF U.S. PATENT '541 TO PATTERSON.

7           AND SO TO OVERCOME THAT, ADOBE HAD TO WRITE PAPERS TO THE  
8           PATENT OFFICE, AND APPEAL IT, AND FIGHT ABOUT WHETHER OR NOT  
9           THE PATTERSON PATENT WAS A REASON TO REJECT THEIR PATENT.

10          ISSUES: WAS IT PROPERLY REJECTED UNDER PATTERSON?

11          PROPERLY REJECTED UNDER PATTERSON.

12          PROPERLY REJECTED UNDER PATTERSON.

13          HERE YOU WILL SEE ARGUMENT ABOUT:

14          "CLAIM 1 STANDS FINALLY REJECTED AS BEING UNPATENTABLE  
15          OVER PATTERSON."

16          YOU WILL SEE IN THE ARGUMENT REFERENCE AFTER REFERENCE  
17          AFTER REFERENCE AFTER REFERENCE AFTER REFERENCE TO THE  
18          PATTERSON PATENT.

19          AND HOW ADOBE'S LAWYERS HAD TO CONTINUE TO ARGUE ABOUT THE  
20          PATTERSON PATENT. FINALLY, IN RESPONSE TO ARGUMENT, YOU WILL  
21          SEE THAT THE PATENT OFFICE SAID THAT THE REFERENCE OF  
22          PATTERSON WAS ADDED IN FURTHER REVIEW OF THE PREVIOUSLY-CITED  
23          REFERENCES FOR NEW GROUNDS OF REJECTION.

24          AND IN A SHEET YOU WILL SEE IN A NUMBER OF THESE  
25          PROSECUTION HISTORIES, NOTICE OF REFERENCES CITED, YOU WILL

1 SEE THERE THAT THE EXAMINER OF THE UNITED STATES PATENT  
2 OFFICE, MR. TRAN, CITED THE PATTERSON PATENT BY NUMBER TO  
3 ADOBE.

4 AND INSIDE OF THAT SAME PATENT BY NAME:

5 "REGULATING ACCESS TO DIGITAL CONTENT."

6 SO NEXT WE MOVE TO THE '143 PATENT. THAT, AGAIN, IS  
7 ANOTHER PATENT FILED BY ADOBE. AND THIS TIME ON THE VERY FACE  
8 OF THIS PATENT YOU WILL SEE THAT THE '541 PATTERSON PATENT IS  
9 LISTED AGAIN. EXCEPT THIS TIME THERE IS NO ASTERISK, BECAUSE  
10 THIS TIME THE FILE HISTORY WILL SHOW YOU THAT IN INFORMATION  
11 DISCLOSURE STATEMENT BY APPLICANT, ADOBE, THEY LISTED THE '541  
12 PATTERSON PATENT. SOMEONE OVER THERE WAS PAYING ATTENTION.

13 NEXT, WE MOVE TO THE '642 PATENT. NOW, THIS ONE YOU'VE  
14 SEEN BEFORE BECAUSE MR. HERBACH CAME OVER HERE FROM ADOBE,  
15 TESTIFIED TO YOU, AND HE ACTUALLY WALKED THROUGH THIS PATENT.  
16 THIS WAS HIS. AND ON THE FACE OF THIS PATENT YOU'LL SEE THAT  
17 THE '670 PATTERSON PATENT, THE TRACKING PATENT, WELL, THAT IS  
18 ALSO POINTED OUT.

19 AND, LOOK. THERE IS THAT ASTERISK AGAIN. AND IF YOU GO  
20 INTO THE PROSECUTION HISTORY, YOU WILL SEE THAT, AGAIN, NOTICE  
21 OF REFERENCES CITED. THE PATENT EXAMINER POINTED OUT TO ADOBE  
22 THE '670 TRACKING PATENT BY PATRICK PATTERSON.

23 SO WHEN MR. HERBACH FILED WHAT WOULD EVENTUALLY BECOME THE  
24 '102 PATENT -- AGAIN, GRANTED TO ADOBE -- THIS TIME ON THE  
25 FACE OF THE PATENT THERE IS THE '670, THE TRACKING PATENT.

1 BUT THIS TIME NO ASTERISK. BECAUSE IF YOU LOOK AT THE FILE  
2 HISTORY MR. HERBACH AND ADOBE CITED THAT PATENT THEMSELVES.

3 AS YOU'VE SEEN THERE IS A SIGNIFICANT AMOUNT OF  
4 UNCONTROVERTED EVIDENCE IN THE DOCUMENTS HELD ONTO BY THE  
5 PATENT OFFICE ABOUT WHAT ADOBE KNEW AND WHEN THEY KNEW IT.  
6 AND IN ADDITION TO THESE DOCUMENTS, YOU ALSO WERE SHOWN THE  
7 ADOBE VALUE PROPOSITION, WHICH MR. VENTERS TESTIFIED HE WENT  
8 THROUGH WITH MEMBERS OF ADOBE VENTURES ON THE PHONE DURING THE  
9 SUMMER OF 2004.

10 AND HE WENT OVER IN GREAT DETAIL ABOUT WHAT VALUE THESE  
11 DIGITAL REG PATENTS COULD GIVE TO ADOBE FOR THEM TO USE IN  
12 THEIR PRODUCTS. HE SAID IT WOULD GIVE USERS OF ADOBE PRODUCTS  
13 A WAY TO SECURELY TRACK, AUTHENTICATE AND MONETIZE DOCUMENTS,  
14 GRAPHICS AND OTHER MEDIA.

15 HE WENT THROUGH WITH ADOBE HOW, IF THEY USE THESE DIGITAL  
16 REG PATENTS IN THEIR ADOBE STANDALONE PRODUCTS, IT WOULD  
17 COMPLETE THE ECOSYSTEMS FOR ALL THESE DIFFERENT TYPES OF ADOBE  
18 PRODUCTS.

19 AND, FINALLY, IT EVEN DISCUSSED THE TRACKING PATENT BY  
20 NAME:

21 "WITH THE GRANTING OF 'TRACKING ELECTRONIC CONTENT' BY THE  
22 U.S. PATENT OFFICE, DIGITAL CONTAINERS HAS OBTAINED THE  
23 'SUPERDISTRIBUTION' PATENT.

24 AND IN THE NEXT PARAGRAPH YOU WILL SEE THEY REFER TO THE  
25 '541 PATENT BY THE NUMBER AND THE NAME:

1 "REGULATING ACCESS TO DIGITAL CONTENT."

2 CONSIDER THIS EVIDENCE WHEN YOU CONSIDER WHAT ADOBE KNEW  
3 AND WHEN THEY KNEW IT.

4 NOW, IN ADOBE'S OPENING STATEMENT THEY PUT UP THIS  
5 DEMONSTRATIVE OF A TIME LINE SHOWING WHEN LIVECYCLE WAS  
6 DEVELOPED, WHEN FLASH ACCESS WAS RELEASED. BUT IN FIGURING  
7 OUT WHAT THEY KNEW AND WHEN THEY KNEW IT, THEY DIDN'T PUT WHEN  
8 THE PATENTS WERE FILED THAT ARE AT ISSUE IN THIS CASE OR EVEN  
9 WHEN THOSE PATENTS ISSUED. IN FACT, THEY DIDN'T EVEN LEAVE  
10 ROOM ON THE TIME LINE.

11 SO WE HAVE EXTENDED IT BACK TO SHOW YOU IN CONTEXT WHEN  
12 THE APPLICATION FOR THE '541 WAS FILED, WHEN THE APPLICATION  
13 FOR THE '670 PATENT WAS FILED, WHEN THE APPLICATION FOR THE  
14 '541 PATENT WAS GRANTED, AND WHEN THE APPLICATION FOR THE '670  
15 PATENT WAS GRANTED.

16 WHEN YOU ARE CONSIDERING WHAT ADOBE KNEW AND WHEN THEY  
17 KNEW IT, AND IN LIGHT OF WHEN ALL OF THOSE PATENTS WERE FILED  
18 THAT WE DISCUSSED, CONSIDER THAT TIME LINE.

19 AND CONSIDER ALSO THE TESTIMONY THAT YOU HEARD FROM  
20 MR. HERBACH THAT WHEN HE WENT THROUGH THAT PATENT APPLICATION  
21 PROCESS HIMSELF, YES, HE DID WORK WITH OUTSIDE COUNSEL. BUT  
22 HE ALSO WORKED WITH IN-HOUSE COUNSEL.

23 THOSE ARE LAWYERS WHO ARE EMPLOYED BY ADOBE. THEY GO TO  
24 WORK THERE EVERY DAY. THEY ARE NOT IN A SEPARATE LAW FIRM.  
25 THEY ARE ADOBE EMPLOYEES.

1           AND MR. HERBACH TESTIFIED THAT HE WORKED WITH THEM DURING  
2           THAT APPLICATION PROCESS.

3           NOW, ADOBE'S ALSO MADE AN ISSUE THROUGHOUT THIS CASE  
4           REGARDING WHAT THEY KNEW AND WHEN THEY KNEW IT THAT WE DRAGGED  
5           THEM INTO COURT HERE, AND WE'VE MADE THEM GO TO THE EXPENSE OF  
6           HIRING THESE LAWYERS AND EXPERTS AND HAVING EXECUTIVES SIT  
7           THROUGH WEEKS OF TRIAL.

8           BUT THEN, ON THE OTHER HAND, THEY SHOWED YOU AN OPENING  
9           STATEMENT WITH THIS DEMONSTRATIVE, WHICH WENT THROUGH ALL OF  
10          THOSE DATES THAT YOU JUST LOOKED AT. AND UNDER EACH ONE WROTE  
11          "NO LAWSUIT, NO LAWSUIT, NO LAWSUIT, NO LAWSUIT, NO LAWSUIT."

12          IT IS AS IF ADOBE IS TELLING YOU THAT THE ONLY TIME THEY  
13          PAY ATTENTION IS WHEN SOMEBODY SUES THEM.

14          MEMBERS OF THE JURY, WE WOULD SUBMIT TO YOU THAT THAT IS  
15          RECKLESS. THAT'S WILLFUL.

16          THE JUDGE HAS INSTRUCTED YOU THAT EVEN IF YOU DON'T FIND  
17          WILLFULNESS, EVEN IF THAT NEVER ENTERED INTO THIS COURTROOM,  
18          THAT YOU COULD STILL FIND THAT ADOBE INFRINGED OUR PATENTS.

19          AND THERE'S TWO TYPES OF INFRINGEMENT THAT YOU ARE  
20          INSTRUCTED ABOUT: DIRECT AND INDIRECT. NOW, TO DECIDE  
21          WHETHER ADOBE DIRECTLY INFRINGES A CLAIM OF DIGITAL REG'S  
22          PATENTS, YOU MUST COMPARE ACTIONS BY ADOBE WITH THE PATENT  
23          CLAIMS, AND DETERMINE WHETHER EVERY REQUIREMENT OF THE CLAIM  
24          WAS CARRIED OUT BY ADOBE.

25          IF SO, ADOBE DIRECTLY INFRINGES THAT CLAIM. AND THIS IS

1 WHERE IT IS DIFFERENT FROM WILLFULNESS. WHETHER OR NOT ADOBE  
2 KNEW ITS PRODUCTS INFRINGED, OR EVEN KNEW OF THE PATENT, DOES  
3 NOT MATTER IN DETERMINING DIRECT INFRINGEMENT. IN THIS CASE  
4 DIGITAL REG ARGUES THAT ADOBE INFRINGED ITS PATENTS BOTH  
5 DIRECTLY AND INDIRECTLY.

6 AND INDIRECT INFRINGEMENT, JUST SO THAT WE UNDERSTAND THE  
7 RULES WE ARE LIVING BY, IS THE ACT OF ENCOURAGING OR INDUCING  
8 OTHERS TO INFRINGE A PATENT. THAT'S CALLED "INDUCING  
9 INFRINGEMENT."

10 NOW, IN ORDER TO DETERMINE WHETHER OR NOT ADOBE HAS  
11 INFRINGED, WHETHER DIRECTLY OR INDIRECTLY, DIGITAL REG'S  
12 PATENTS, WE WANT YOU TO FOCUS ON THREE THINGS: THE DOCUMENTS,  
13 THE CODE, AND THE CLAIMS. THOSE THREE THINGS WILL GIVE YOU  
14 YOUR ANSWER.

15 AND I WANT TO SPEND JUST A BRIEF MOMENT TALKING AGAIN  
16 ABOUT WHAT IS ACTUALLY AT ISSUE HERE. IT IS THESE SIX CLAIMS.  
17 FOUR CLAIMS OF THE '541 PATENT. TWO CLAIMS OF THE '670  
18 TRACKING PATENT. AND THERE'S THIS ONE INDEPENDENT CLAIM, THIS  
19 METHOD OF REGULATING ACCESS TO DIGITAL CONTENT. AND IT  
20 FOCUSES ON WHAT HAPPENS AT THE CLIENT COMPUTER, THE ONE YOU  
21 HAVE ON YOUR DESK.

22 AT A CLIENT EXECUTING AN ACCESS CHECKING PROCESS TO  
23 DETERMINE WHETHER THE CLIENT HOLDS A PRE-EXISTING  
24 PERMISSION -- OR PERSIMMON, AS DR. DEVANBU SAID -- FOR A  
25 RESOURCE TO ACCESS THAT DIGITAL CONTENT. IF IT DOESN'T, NEXT

1 STEP: REQUEST PERMISSION FROM AN EXTERNAL SOURCE FOR THAT  
2 RESOURCE.

3 RECEIVING FROM THAT EXTERNAL SOURCE A TOKEN. AND THE LAST  
4 STEP: BASED ORDER THAT RECEIVED TOKEN, EXECUTING AN  
5 INSTALLATION PROCESS THAT GENERATES AT THE CLIENT A PERMISSION  
6 THAT IS LOCKED UNIQUELY TO THE CLIENT AND THAT MAY BE FOUND BY  
7 A LATER EXECUTION OF THAT PROCESS.

8 SO THAT'S THE CLAIM THAT GOVERNS THE REST OF THE ONES IN  
9 THE '541. SO FOR CLAIM 2, 4, AND 13, THE DEPENDENT CLAIMS,  
10 THEY DEPEND ON CLAIM 1, AND THEY ADD A LITTLE BIT.

11 CLAIM 2 ADDS WHEN THEY REQUEST THE PERMISSION, YOU RECEIVE  
12 A TOKEN AND SELECTIVELY GRANT THE RESOURCE ACCESS, ARE ALL  
13 PERFORMED BY THE CLIENT.

14 CLAIM 4 TALKS ABOUT WHERE THE PERMISSION COMPRISES A  
15 UNIQUE CODED KEY, RESPONDING TO THE DIGITAL CONTENT.

16 AND THE LAST DEPENDENT CLAIM, 13, TALKS ABOUT REQUESTING  
17 THE PERMISSION FROM THE EXTERNAL SOURCE, AND THAT INITIATES  
18 THIS WHOLE AUTHORIZATION PROCEDURE YOU'VE HEARD ABOUT. AND  
19 THAT THE TOKEN RECEIVED IS BASED ON THE RESULT OF THAT  
20 PROCEDURE.

21 SO AS YOU LOOK AT THE DOCUMENTS AND THE COMPUTER CODE,  
22 LOOK AT THE CLAIMS, AND SEE HOW THEY MATCH UP, BECAUSE THE  
23 EVIDENCE IS THERE.

24 ON THE '670 PATENT, THIS TALKS ABOUT TRACKING. TRACKING  
25 THE CONTENT. AND THERE'S A METHOD ABOUT CREATING A FILE. AND



1 THAT FILE INCLUDES SOME ELECTRONIC CONTENT. AND THAT CONTENT,  
2 IT CAUSES ACCESS TO THE ELECTRONIC CONTENT TO BE DENIED UNTIL  
3 NOTIFICATION INFORMATION IS COLLECTED BY EXECUTABLE  
4 INSTRUCTIONS AND HAS BEEN SUCCESSFULLY TRANSMITTED OUT.

5 YOU HAVE TO TRANSMIT THE FILE TO AT LEAST ONE ADDRESS, AND  
6 THEN RECEIVE A NOTIFICATION INFORMATION FROM THE NEXT  
7 RECIPIENT, OTHER THAN THAT OF THE SENDER OF WHAT THE CONTENT  
8 IS.

9 AND THEN, THERE IS ONE DEPENDENT CLAIM HERE THAT WHEN YOU  
10 CREATE THE FILE THAT INCLUDES ENCRYPTING THE DOCUMENT. AND  
11 ONE WAY TO THINK ABOUT THE CLAIMS OF BOTH THE '541 AND THE  
12 '670 IS TO REMEMBER BACK TO WHAT MR. PATTERSON AND I TALKED  
13 ABOUT WHEN HE WAS ON THE STAND LAST WEEK.

14 BECAUSE MR. PATTERSON TOLD YOU THAT HIS WHOLE IDEA  
15 CENTERED AROUND THAT DIGITAL ENVELOPE, RIGHT? HOW HE WANTED  
16 TO CREATE THIS VESSEL THAT WOULD ALLOW HIM TO PUT  
17 COPYRIGHTABLE MATERIALS INTO SOMETHING AND PROTECT IT ALL THE  
18 WAY THROUGH THE PROCESS. SO WHEN YOU LOOKED AT IT ON  
19 DIFFERENT MACHINES YOU OWN YOU WOULDN'T HAVE TO KEEP ENTERING  
20 IN THE SAME CODES AND GO THROUGH THAT WHOLE PROCESS. SO YOU  
21 COULD ACTUALLY USE MUSIC AND BOOKS AND FILMS, LIKE WE ALL DO  
22 TODAY.

23 AND THAT IS WHAT HE TOLD YOU HE WANTED TO DO WAS REGULATE  
24 THAT ACCESS TO DIGITAL CONTENT. BUT IT DIDN'T STOP THERE. HE  
25 KNEW THAT TO MAKE MONEY ON IT IT WOULD BE IMPORTANT FOR YOU TO

1 BE ABLE TO TRACK THAT ELECTRONIC CONTENT. AND HE TOLD YOU  
2 THAT STORY OF JULIAN LENNON, JOHN LENNON'S SON, WHO RELEASED  
3 THAT SONG ON THEIR WEBSITE.

4 AND HE SAID THAT THAT FIRST MONTH IT CREATED A LOT OF  
5 BUZZ. IT HAD A QUARTER MILLION DOWNLOADS. THEY HAD A QUARTER  
6 MILLION DOWNLOADS THAT WERE REGULATING ACCESS TO THAT DIGITAL  
7 CONTENT. BUT THAT THEY ALSO HAD HALF A MILLION PASSAROUNDS,  
8 HE CALLED THEM. AND THE REASON THEY KNEW THEY HAD HALF A  
9 MILLION PASSAROUNDS IS BECAUSE THEY COULD TRACK WHAT PEOPLE  
10 DID WITH THE CONTENT.

11 WHAT HE DESCRIBED IS WHAT HE GOT. AFTER YEARS OF WORKING  
12 THROUGH THE PATENT OFFICE, THE '541 AND THE '670 PATENT WERE  
13 BOTH GRANTED.

14 SO NOW TO TALK ABOUT HOW ADOBE HAS INFRINGED THEM, FIRST,  
15 LET'S TALK ABOUT THE SOURCE CODE.

16 NOW, DR. DEVANBU TESTIFIED TO YOU A LOT ABOUT THE SOURCE  
17 CODE, ABOUT HOW HE SPENT 16 YEARS TEACHING THIS SAME SOURCE  
18 CODE, THE SAME COMPUTER CODE THAT ADOBE USES IN ITS PRODUCTS  
19 TO HIS STUDENTS AT UC DAVIS.

20 AND HE ALSO TOLD YOU THAT HE'S NEVER TESTIFIED BEFORE. HE  
21 HAS NEVER DONE THIS BEFORE EXCEPT FOR THAT CAR WRECK CASE. HE  
22 NEVER HAS COME INTO COURT AND TOLD THE JURY WHETHER OR NOT  
23 THINGS INFRINGE. ALL HE DOES IS TEACH CODE. THAT'S HIS JOB.

24 AND HE TOLD YOU THAT SOURCE CODE IS WHAT'S USED BY  
25 PROGRAMMERS TO WRITE THE SOFTWARE, TO UNDERSTAND IT AND TO

1 MAINTAIN IT. AND THAT SOURCE CODE IS THE MOST ACCURATE  
2 REPRESENTATION OF WHAT ACTUALLY HAPPENS WHEN A SYSTEM RUNS.  
3 AND THAT IS WHY DR. DEVANBU GOT UNDER THE HOOD, EXAMINED THE  
4 CODE HIMSELF SO THAT HE DIDN'T HAVE TO ONLY RELY ON DOCUMENTS  
5 OR ONLY RELY ON TESTIMONY. HE GOT UNDER THE HOOD AND LOOKED  
6 AT THE CODE.

7 HE SAID:

8 "I LOOKED AT THE DOCUMENTS MADE AVAILABLE BY ADOBE AND THE  
9 SOURCE CODE."

10 NOW, DR. WICKER TOLD YOU -- HE'S ADOBE'S EXPERT. HE TOLD  
11 YOU HE CAN ALSO READ CODE. AND WHAT HE TOLD YOU ON THE STAND  
12 IS THAT HE AGREED THAT WHEN DR. DEVANBU DESCRIBED A PIECE OF  
13 CODE, HE AGREED WITH WHAT HE WAS SAYING, AFTER CONFIRMING IT,  
14 OF COURSE, WITH ADOBE'S ENGINEERS AND HIS OWN INITIAL  
15 REACTION.

16 SO DR. WICKER LOOKED AT WHAT DR. DEVANBU DID, HIS CODE  
17 ANALYSIS. LOOKED AT IT BECAUSE HE COULD READ CODE, TOO, AND  
18 CONFIRMED IT. AND THEN TALKED TO ADOBE'S ENGINEERS, WHO  
19 OBVIOUSLY CAN READ CODE. THEY WRITED IT. AND THEY CONFERRED  
20 IT. NO ONE DISPUTES THAT.

21 SAID:

22 "THAT'S RIGHT. WHEN I LOOKED AT THE SPECIFIC CODE THAT  
23 DR. DEVANBU LOOKED AT, IT APPEARED TO ME THAT HE WAS  
24 DESCRIBING IT CORRECTLY."

25 DR. WICKER SAID HE TALKED TO MR. HERBACH, WHO TESTIFIED TO

1 YOU TODAY -- OR TESTIFIED TO YOU DURING THIS TRIAL. AND  
2 AGREED WITH MR. HERBACH THAT THE MOST ACCURATE REFLECTION OF  
3 THE ACCUSED TECHNOLOGY IS THE SOURCE CODE.

4 AND DR. WICKER CONFIRMED ON THE STAND THAT HE DIDN'T  
5 REVIEW THE SOURCE CODE HIMSELF OTHER THAN WHAT DR. DEVANBU PUT  
6 IN HIS REPORT.

7 "THAT'S CORRECT."

8 HE CONFIRMED THAT HE HAD NO PROBLEM WITH IT, AND HE  
9 CONFIRMED THAT THE SOURCE CODE DESCRIBES EXACTLY HOW THE  
10 PRODUCT WORKS.

11 NOW, YOU ARE GOING TO HAVE TO FOCUS ON ALL OF THE ELEMENTS  
12 OF THESE CLAIMS, BUT I DID WANT TO AT LEAST POINT OUT ONE  
13 ARGUMENT THAT ADOBE MADE IN THEIR OPENING STATEMENT. I'M SURE  
14 WE WILL HEAR MORE ABOUT IT DURING THEIR CLOSING ARGUMENT.

15 AND THAT'S ABOUT THIS RECEIVING FROM THE EXTERNAL SOURCE A  
16 TOKEN.

17 NOW, IN THE PARLANCE OF ADOBE YOU'VE HEARD A LOT ABOUT  
18 LIVECYCLE'S VOUCHER, AND IN FLASH ABOUT THEIR LICENSED FILES.  
19 THAT IS WHAT DIGITAL REG IS SAYING FULFILLS THAT TOKEN  
20 REQUIREMENT.

21 AND DR. DEVANBU, IN TESTIFYING IN HIS REPORT ABOUT THE  
22 TOKEN, LOOKED TO SEE: WELL, HOW DOES ADOBE DESCRIBE IT. WHAT  
23 DID MR. HERBACH SAY? AND CONFIRMED THAT IN A VOUCHER, WHICH  
24 IS WHAT ADOBE'S CALLED A TOKEN HERE, A DOCUMENT KEY WITHIN THE  
25 VOUCHER, FOR EXAMPLE, IS USED TO SYMMETRICALLY DECRYPT THE

1 DOCUMENT.

2 AND THEN, HE WAS ASKED:

3 "WELL, WHAT ELSE CAN YOU USE IT FOR, JUST THAT?

4 "NO, THE VOUCHER THAT ADOBE USES CAN ALSO INSTRUCT THE  
5 CLIENT APPLICATION, LIKE, FOR EXAMPLE, WHETHER OR NOT YOU HAVE  
6 PERMISSION TO PRINT."

7 SO IT IS MORE THAN JUST THAT ONE PIECE OF INFORMATION.  
8 BUT ADOBE TOLD YOU THAT YOU HAD TO HAVE THAT, WHAT THEY CALLED  
9 THE YES/NO TOKEN FROM THE SERVER. AND THAT IF IT IS A "YES,"  
10 THEN GENERATE AT THE CLIENT A PERMISSION LOCKED TO THE CLIENT.

11 TO HELP PROVE UP THAT POINT THEY SHOWED YOU THIS DOCUMENT  
12 ABOUT HOW KEYS ARE GENERATED AT THE SERVER. AND THEY  
13 HIGHLIGHTED WHAT YOU SEE BEFORE YOU.

14 BUT WHAT THEY DIDN'T HIGHLIGHT IS, I THINK, EQUALLY  
15 IMPORTANT. WHAT THEY DIDN'T HIGHLIGHT IS THAT IN RESPONSE TO  
16 AN E-LICENSE DOWNLOAD REQUEST, IT THEN GOES ON TO SAY:

17 "THE LICENSE IS PROCESSED BY ALM AND IS STORED IN A  
18 SECURED CONTAINER AT THE CLIENT MACHINE. AND THEN, AFTER THAT  
19 IS DONE, NO ADDITIONAL NETWORK PACKAGES OR REQUESTS ARE  
20 NEEDED."

21 AND THEY SORT OF LEFT IT AT THAT. THEY DIDN'T TALK ABOUT  
22 HOW ONCE IT IS STORED AT THE CLIENT THE PROCESS STILL EXECUTES  
23 TO CHECK AT THE CLIENT THE ACCESS CHECKING PROCESS. THAT  
24 STILL HAPPENS.

25 ANOTHER DOCUMENT DR. DEVANBU TALKED ABOUT, STATES:

1 "ISSUING A LICENSE CONTAINING THE CONTENT ENCRYPTION KEY  
2 TO DECRYPT THE CONTENT AND THE USAGE RULES ASSOCIATED WITH  
3 IT."

4 AGAIN, MORE THAN JUST THE ONE THING IN THAT LICENSE.

5 AND IF ALLOWED BY THE LICENSE, THE CLIENT STORES THE  
6 LICENSE TO ENABLE OFFLINE ACCESS. LICENSE CACHING ALLOWS THE  
7 CONSUMER TO VIEW PROTECTED CONTENT WITHOUT REACQUIRING A  
8 LICENSE EVERY TIME THEY WANT TO VIEW CONTENT.

9 THAT GOES BACK TO MR. PATTERSON'S IDEA OF BEING ABLE TO  
10 ALWAYS ACCESS THE SECURE CONTENT AND KEEP IT SAFE FROM BEING  
11 DISTRIBUTED TO PLACES YOU DIDN'T WANT IT TO GO, BUT STILL  
12 BEING ABLE TO UTILIZE IT.

13 SO WHAT DID DR. DEVANBU DO? HE LOOKED AT THE CODE. AND  
14 WHAT DOES THE CODE TELL YOU? THE CODE TELLS YOU THAT A CHECK  
15 IS PERFORMED TO SEE WHETHER OR NOT YOU HAVE A LOCAL VOUCHER  
16 STORED ON THE CLIENT. IS IT AVAILABLE? IF IT IS, THE CODE  
17 SAYS YOU CAN PROCEED.

18 IF IT'S NOT, THE CODE SAYS YOU HAVE TO REQUEST ACCESS  
19 ONLINE.

20 SO LOOK AT THOSE STEPS THERE THAT DR. DEVANBU OUTLINED IN  
21 THE COMPUTER CODE AND COMPARE THEM TO WHAT HAPPENS IN CLAIM 1  
22 OF THE '541 PATENT. AT A CLIENT, LOCAL VOUCHER, EXECUTING AN  
23 ACCESS CHECKING PROCESS TO DETERMINE WHETHER THE CLIENT HOLDS  
24 A PRE-EXISTING PERMISSION FOR A RESOURCE TO ACCESS THE DIGITAL  
25 CONTENT.

1            THAT LOCAL VOUCHER? IT IS RIGHT THERE IN THE CODE. IF  
2            NOT, REQUESTING PERMISSION FROM AN EXTERNAL SOURCE OR THE  
3            RESOURCE TO ACCESS THE DIGITAL CONTENT. IT'S RIGHT THERE IN  
4            THE CODE. AVAILABLE? IF NOT, ASK THE SERVER.

5            THE DOCUMENTS, THE CODE AND THE CLAIMS WILL GOVERN YOUR  
6            DECISION HERE TODAY. AND NO ONE DISPUTES HOW DR. DEVANBU  
7            READS THAT CODE.

8            IN ADDITION TO THE CODE, MEMBERS OF THE JURY, YOU ARE ALSO  
9            GOING TO HAVE DOCUMENTS THAT YOU CAN TAKE BACK TO THE JURY  
10           ROOM AND READ. AND LIKE I PROMISED YOU, I'M NOT GOING TO GO  
11           THROUGH A LOT OF THEM. BUT I DO WANT TO SHOW YOU THREE. AND  
12           YOU ARE GOING TO HAVE PAPER COPIES THAT LOOK JUST LIKE THIS  
13           (INDICATING). AND YOU ARE GOING TO BE ABLE TO TAKE THEM BACK  
14           THERE AND READ THEM CAREFULLY AND COMPARE THEM TO THESE  
15           CLAIMS.

16           AND WHAT IS IMPORTANT ABOUT THESE DOCUMENTS, THESE WHITE  
17           PAPERS AND WEBSITES, IS THAT THEY WEREN'T WRITTEN FOR THE  
18           COURTROOM. THEY WERE WRITTEN FOR THE BOARDROOM. THEY WERE  
19           WRITTEN WITH BUSINESS IN MIND, NOT A LAWSUIT.

20           THEY WERE WRITTEN WITH THE IDEA OF INSTRUCTING ADOBE'S  
21           CUSTOMERS HOW TO USE THE PRODUCTS.

22           LET'S LOOK AT PLAINTIFF'S 16. ADOBE LICENSE MANAGER.

23           ON THE VERY FIRST PAGE ADOBE LICENSE MANAGER'S DOCUMENT  
24           CALLS IT AN EMBEDDED E-LICENSE MANAGEMENT SYSTEM THAT HELPS  
25           ORGANIZATIONS MANAGE ADOBE SOFTWARE, E-LICENSES AND MONITOR

1 E-LICENSE USAGE.

2 IT GOES ON TO SAY THAT IT IS TIGHTLY INTEGRATED WITH THE  
3 OVERALL ORDERING PROCESSING SYSTEM, AND THAT IT AUTOMATICALLY  
4 DOWNLOADS THE APPROPRIATE E-LICENSES FOR SOFTWARE  
5 INSTALLATIONS AND PROVIDES REPORTS TO HELP SIMPLIFY  
6 RECORDKEEPING FOR INTERNAL CONTROLS.

7 AND THEN, ON PAGE 7 OF EXHIBIT 16, IT TALKS ABOUT  
8 E-LICENSE TRACKING. TRACKING. AND HOW ALM MAKES IT EASY TO  
9 TRACK HOW MANY E-LICENSES HAVE BEEN DOWNLOADED AND TO WHICH  
10 CLIENT MACHINES. JUST LIKE THE '670 PATENT ALLOWED  
11 MR. PATTERSON TO TRACK HOW MANY COPIES OF JULIAN LENNON'S SONG  
12 WERE DOWNLOADED.

13 AND THEN, ADOBE DESCRIBES HOW ALM WORKS AND HOW IT CHECKS  
14 FOR AN E-LICENSE ON A CLIENT MACHINE, ON A USER'S MACHINE, AND  
15 THEN VERIFIES THAT THE APPLICATION HAS A PROPER E-LICENSE.

16 IF NO E-LICENSE IS FOUND, IT REQUESTS ONE FROM THE  
17 E-LICENSE POOL, MAKING A ONE-TIME CONNECTION TO EITHER THE  
18 IN-HOUSE ADOBE LICENSE SERVER OR AN ALM BACK-END SERVICE,  
19 DEPENDING ON THE CHOSEN HOSTING OPTION.

20 ONCE AN E-LICENSE IS DOWNLOADED, NO FURTHER COMMUNICATION  
21 IS REQUIRED. IT'S ON THE CLIENT.

22 NEXT, I WANT YOU TO LOOK AT EXHIBIT 52. THIS ONE IS FROM  
23 ADOBE'S WEBSITE ABOUT LIVECYCLE RIGHTS MANAGEMENT, ES2, IS  
24 WHAT IT IS CALLED. IT IS ON ADOBE'S HELP PAGES WHERE  
25 CUSTOMERS CAN GO AND RECEIVE INSTRUCTION ABOUT EXACTLY HOW TO



1 USE THEIR PRODUCTS.

2 AND IN ADOBE'S OWN WORDS:

3 "ADOBE LIVECYCLE RIGHTS MANAGEMENT ENSURES THAT ONLY  
4 AUTHORIZED USERS CAN USE YOUR DOCUMENTS. AND USING RIGHTS  
5 MANAGEMENT ES2 YOU CAN SAFELY DISTRIBUTE ANY INFORMATION THAT  
6 YOU HAVE SAVED IN A SUPPORTED FORMAT."

7 IN OTHER WORDS, YOU CAN REGULATE ACCESS TO DIGITAL  
8 CONTENT. AND YOU CAN DO IT FOR ADOBE PDF FILES AND YOU CAN DO  
9 IT FOR ADOBE FLASH FILES.

10 THE DOCUMENT THEN GOES ON TO DESCRIBE ACCESS CONTROL, AND  
11 HOW YOU HAVE THE ABILITY TO TRACK EVENTS, SUCH AS WHEN AN  
12 AUTHORIZED OR UNAUTHORIZED USER ATTEMPTS TO OPEN THE DOCUMENT.

13 AND ON THE NEXT PAGE OF ADOBE'S DOCUMENT YOU WILL SEE THIS  
14 DIAGRAM WHERE THE FOURTH AND FINAL STEP TALKS ABOUT THE  
15 ABILITY, USING LIVECYCLE RIGHTS MANAGEMENT, TO TRACK DOCUMENTS  
16 AND MODIFY ACCESS TO THEM USING WEB PAGES.

17 AGAIN, THE DOCUMENTS, THE CODE AND THE CLAIMS.

18 THE LAST DOCUMENT I WANT TO SHOW YOU ON THIS SUBJECT IS  
19 THIS ADOBE FLASH ACCESS OVERVIEW FOR VERSION 3.0. AGAIN, YOU  
20 WILL SEE IN THE BOTTOM RIGHT CORNER "PUBLISHED BY ADOBE."

21 AND THAT OVERVIEW TALKS ABOUT WHAT FLASH ACCESS DOES AND  
22 WHY IT'S IMPORTANT, BECAUSE FLASH ACCESS LETS CONTENT OWNERS  
23 AND DISTRIBUTORS CONTROL HOW AND WHERE THEIR CONTENT CAN BE  
24 DISTRIBUTED AND EXPERIENCED, PROVIDING END TO END PROTECTION  
25 THROUGHOUT THE CONTENT LIFE CYCLE.

1 THINK BACK TO MR. PATTERSON'S TESTIMONY: THROUGHOUT THE  
2 CONTENT LIFE CYCLE, KEEPING THAT COPYRIGHTED MATERIAL  
3 PROTECTED.

4 THAT WAS THE WHOLE POINT OF THE '541 AND THE '670 PATENT.  
5 IT TALKS ABOUT ENCRYPTING FLASH VIDEO FILES, WHICH CAN THEN BE  
6 STREAMED OR DOWNLOADED TO VARIOUS PLATFORMS, AND ENFORCES  
7 BUSINESS MODELS, SUCH AS ONLINE VIDEO RENTAL.

8 IT WOULD BE PRETTY IMPORTANT TO COMPANIES THAT YOU HEARD  
9 USE IT, LIKE HULU, LIKE AMAZON.COM.

10 THIS DOCUMENT THEN GOES ON TO TALK ABOUT, WELL, HOW DO YOU  
11 ACQUIRE A LICENSE? IT TALKS ABOUT HOW LICENSE ACQUISITION IS  
12 THE PROCESS OF ACQUIRING A LICENSE ALLOWING THE CONSUMER TO  
13 DECRYPT AND VIEW THAT PROTECTED CONTENT ACCORDING TO A SET OF  
14 USAGE RULES.

15 AND THAT LICENSE ACQUISITION OCCURS WHEN A CLIENT SENDS  
16 INFORMATION IDENTIFYING THE REQUESTED CONTENT, AND THE MACHINE  
17 TO THE LICENSE SERVER.

18 BUT THEN, IN THE NEXT PARAGRAPH IT SAYS:

19 "IF THE USER IS AUTHORIZED TO ACCESS THE CONTENT, THE  
20 LICENSE SERVER ISSUES A LICENSE ALLOWING THE RUNTIME CLIENT TO  
21 DECRYPT AND PLAYBACK CONTENT BASED ON THE POLICY AND RIGHTS  
22 ASSOCIATED WITH" THAT SPECIFIC CONSUMER'S ACCOUNT.

23 AND IT TALKS ABOUT HOW THIS IS, IN FACT, A KEY FEATURE OF  
24 ADOBE FLASH ACCESS. AND JUST LIKE MR. PATTERSON SAID HE  
25 DREAMT OF, YOU HAVE PERSISTENT CONTENT PROTECTION. THE

1       CONTENT REMAINS PROTECTED THROUGHOUT THE DISTRIBUTION CHAIN.  
2       ONCE THE CONTENT IS PACKAGED, JUST LIKE IN THAT DIGITAL  
3       ENVELOPE, IT REMAINS PROTECTED AT ALL TIMES, AND PORTIONS OF  
4       IT ARE ONLY DECRYPTED AT THE TIME OF PLAYBACK AND IN  
5       ACCORDANCE WITH THE USAGE RULES.

6             THINK ABOUT CLAIM 52:

7             "WHEREIN CREATING THE FILE COMPRISING ENCRYPTING." BECAUSE  
8       THE CONTENT IS PACKAGED WITH USAGE RULES AND LICENSING  
9       INFORMATION, PROTECTION ALWAYS TRAVELS WITH THE CONTENT. AND  
10      IF AN UNLICENSED CONSUMER ATTEMPTS TO PLAY THE CONTENT, THE  
11      POLICY EMBEDDED IN IT REDIRECTS THEM SO THEY CAN ACQUIRE A  
12      VALID LICENSE FOR THE CONTENT.

13            SOUNDS A LOT LIKE CLAIM 1. IN FACT, IT SOUNDS EXACTLY  
14      LIKE CLAIM 1.

15            NOW, WE PROVIDED EVIDENCE THROUGH DR. DEVANBU OF THESE  
16      ADDITIONAL INDEPENDENT -- RATHER DEPENDENT CLAIMS ABOUT WHEN  
17      YOU REQUEST THE PERMISSION AND RECEIVE THE TOKEN AND  
18      SELECTIVELY GRANT THE RESOURCE ACCESS BEING PERFORMED ON THE  
19      CLIENT.

20            ABOUT WHERE THE PERMISSION COMPRISES THE UNIQUE CODED KEY  
21      CORRESPONDING TO THE DIGITAL CONTENT. AND HOW WHEN YOU  
22      REQUEST PERMISSION FROM THE EXTERNAL SOURCE, THAT INITIATES  
23      THIS AUTHORIZATION PROCEDURE.

24            YOU HEARD DR. DEVANBU TESTIFY ABOUT THAT. AND AS  
25      IMPORTANTLY, YOU HEARD THAT DR. WICKER DIDN'T. HE SAID HE

1 DIDN'T GO BEYOND CLAIM 1, BECAUSE IN HIS MIND IF CLAIM 1 ISN'T  
2 INFRINGED, THEN YOU DON'T HAVE TO REACH OPINIONS ON THE  
3 OTHERS.

4 HE SAYS HE HASN'T TALKED ABOUT IT.

5 "I DIDN'T TESTIFY ABOUT IT."

6 BUT YOU'VE ALSO HEARD A LOT OF TESTIMONY AND ARGUMENT FROM  
7 ADOBE'S SIDE THAT:

8 "WELL, EVEN IF WE DO DO THIS, EVEN IF WE KNEW ABOUT THE  
9 '541 AND '670, EVEN IF IT'S INTEGRATED INTO SEVERAL OF OUR  
10 PRODUCTS, NO ONE ACTUALLY USES IT. THERE'S JUST NO CUSTOMER  
11 DEMAND FOR THIS. IT IS JUST A HANDFUL OF PEOPLE."

12 YOU HEARD WITNESS AFTER WITNESS SAY THAT.

13 BUT WHAT DO THE DOCUMENTS SAY? AND WHAT DO THEIR  
14 WITNESSES SAY. THEIR CORPORATE REPRESENTATIVE WHO HAS BEEN  
15 HERE IN TRIAL EVERY DAY GOT ON THE STAND AND TOLD YOU THAT THE  
16 WHOLE REASON THAT THEY EVEN HAVE SOME OF THIS TECHNOLOGY IS  
17 BECAUSE THE CUSTOMERS HAVE THE NEED.

18 HE POINTED OUT LIKE THE MOVIE STUDIOS. THE HOLLYWOOD  
19 MOVIE STUDIOS HAVE THE NEED TO PROTECT THEIR CONTENT.

20 HE WENT ON TO SAY THAT, WHEN ASKED WHAT WAS THE BASIS THAT  
21 THEY PROVIDED THE INFORMATION TO THEIR CUSTOMERS, WHO TOLD YOU  
22 THAT IT WAS A CUSTOMER NEED:

23 "WELL, CUSTOMERS HAVE REQUESTED THE FUTURE." WELL, I  
24 THINK HE SAID "THE FEATURE." BUT THE FUTURE IS WHAT  
25 MR. PATTERSON WAS CONCERNED ABOUT. CUSTOMERS HAVE REQUESTED

1 THE FEATURE. THEY TOLD US DIRECTLY:

2 "WE NEED TO HAVE OUR CONTENT PROTECTED."

3 AND HE VERIFIED THAT SOME OF THOSE CUSTOMERS INCLUDED HULU  
4 AND AMAZON.

5 YOU HEARD OTHER TESTIMONY THAT SUCH CUSTOMERS INCLUDE THE  
6 UNITED STATES MILITARY. SO ON THE ONE HAND THEY SAY:

7 "NOT VERY MANY PEOPLE WANT THIS. IT IS NOT THAT BIG OF A  
8 DEMAND."

9 ON THE OTHER HAND, WE'RE TALKING ABOUT HOLLYWOOD, AMAZON,  
10 HULU AND THE UNITED STATES MILITARY, BEING JUST A FEW.

11 AND IT WAS SO IMPORTANT TO THEM THAT WHEN THEIR CLIENTS  
12 REQUESTED IT, THEY DEVELOPED NEW PRODUCTS FOR THEM. I'M  
13 PRETTY SURE I HAVE NEVER HAD ADOBE DEVELOP A PRODUCT FOR ME  
14 WHEN I'VE ASKED. YOU HAVE TO BE A PRETTY IMPORTANT CLIENT TO  
15 GET THAT KIND OF SERVICE.

16 AND SO THEN WE HAD TO GO TO THE DOCUMENTS TO POINT OUT HOW  
17 OFTEN THEIR WORDS SAID THESE FEATURES WERE USED. AGAIN,  
18 DOCUMENTS WRITTEN FOR THE BOARDROOM, NOT THE COURTROOM.

19 AND YOU REMEMBER LOOKING AT THIS DOCUMENT THAT SAID:  
20 "ACROBAT FILES MAY BE SECURED USING PASSWORDS, DIGITAL  
21 CERTIFICATES OR USING RIGHTS MANAGEMENT PROVIDED BY ADOBE'S  
22 LIVECYCLE RIGHTS MANAGEMENT SERVER."

23 AND THIS DOCUMENT IS ACTUALLY A WHITE PAPER FOR THE HEALTH  
24 CARE INDUSTRY. SO THERE'S YET ANOTHER EXAMPLE, ALONG WITH THE  
25 MILITARY AND HOLLYWOOD AND HULU AND AMAZON, AGAIN ANOTHER

1 SEGMENT FOR WHICH LIVECYCLE RIGHTS MANAGEMENT SERVER WAS  
2 IMPORTANT.

3 AND THERE YOU SEE THAT IT GIVES INSTRUCTIONS ABOUT HOW TO  
4 USE YOUR ADOBE LIVECYCLE RIGHTS MANAGEMENT.

5 THEN, YOU ALSO SAW THIS DOCUMENT: "WHAT IS NEW IN ACROBAT  
6 PRO X?" A STREAMLINED, SIMPLIFIED USER INTERFACE DISPLAYS THE  
7 MOST COMMONLY USED TOOLS."

8 AND IT SHOWED YOU HOW THERE WAS NOW CHANGE BETWEEN ACROBAT  
9 9 AND ACROBAT X AND WHERE YOU WOULD FIND THAT TO SECURE OR  
10 PROTECT YOUR DOCUMENTS.

11 AND THEN, IT WENT ON TO SAY THAT IT'S SUCH AN IMPORTANT  
12 FEATURE IT'S INSTALLED BY DEFAULT ON THE TOOLBAR WHERE ONLY  
13 THE MOST COMMONLY USED TOOLS APPEAR.

14 NOW, ADOBE TRIED TO RUN FROM THOSE DOCUMENTS. MR. HERBACH  
15 TOLD YOU ON THE STAND, WHEN I ASKED HIM:

16 "YOU WOULD AGREE WITH ME THAT ONLY THE MOST COMMONLY USED  
17 TOOLS APPEAR ON THE TOOLBAR IN ADOBE ACROBAT PRO."

18 AND HIS ANSWER WAS:

19 "NO, I WOULDN'T, ACTUALLY."

20 I THEN, I HAD TO SHOW HIM THE DOCUMENTS THAT I JUST SHOWED  
21 YOU.

22 AND WHEN I ASKED HIM:

23 "BY DEFAULT, ONLY THE MOST COMMONLY USED TOOLS APPEAR IN  
24 THE TOOLBAR," THEN HE HAD TO ANSWER: "THAT'S WHAT IT SAYS,  
25 YES."

1 WE'VE TALKED TO YOU ABOUT WILLFULNESS. AND I HAVE TALKED  
2 TO YOU ABOUT INFRINGEMENT. TALKED TO YOU ABOUT THE SOURCE  
3 CODE AND TALKED TO YOU ABOUT THE DOCUMENTS. I TALKED TO YOU  
4 ABOUT THE CLAIMS. NOW, IT'S TIME TO TALK ABOUT DAMAGES.

5 YOU SAW EVIDENCE, YOU HEARD EVIDENCE ABOUT A NUMBER OF  
6 LICENSE AGREEMENTS THAT DIGITAL REG HAS ALREADY ENTERED INTO  
7 WITH COMPANIES LIKE MICROSOFT, EA, INTUIT, AVG, RPX, LARGE  
8 COMPANIES THAT TOOK LICENSES TO THESE PATENTS FOR THEIR  
9 CUSTOMERS.

10 AND THE DIFFERENCE BETWEEN THOSE LICENSE AGREEMENTS AND  
11 WHAT WE HAVE HERE IS THAT THOSE LICENSE AGREEMENTS  
12 NEGOTIATIONS WERE ACTUAL. THERE WAS A FIGHT ABOUT VALIDITY.  
13 THERE WAS A FIGHT ABOUT INFRINGEMENT. AND BY TIME YOU GET  
14 THROUGH THE VERDICT FORM TO THIS POINT YOU WILL HAVE ALREADY  
15 DETERMINED BOTH INFRINGEMENT AND VALIDITY. SO THOSE ARE OUT  
16 OF THE EQUATION.

17 AND THAT'S WHERE THE HYPOTHETICAL NEGOTIATION FACTORS COME  
18 IN. AND THAT'S WHY IT IS IMPORTANT TO THINK BACK TO OUR  
19 EXPERT'S TESTIMONY ABOUT WHAT THAT HYPOTHETICAL NEGOTIATION  
20 WOULD MEAN. AND HOW HE TOOK THE ROYALTY BASE FROM THE  
21 PRODUCTS IDENTIFIED IN THIS TRIAL AND CAME UP WITH OVER  
22 \$2 BILLION OF TOTAL REVENUE OVER THE ACCUSED TIME PERIOD.

23 BUT FOLLOWING INDUSTRY STANDARDS HE THEN REDUCED THAT  
24 NUMBER BY 70 PERCENT. AND THEN, HE APPLIED A 2.5 PERCENT  
25 ROYALTY RATE, WHICH HE DEEMED WAS REASONABLE BECAUSE HE

1 LEARNED THAT THERE WERE OTHER LICENSE AGREEMENTS THAT HE FELT  
2 APPLIED THAT DIGITAL REG HAD ALREADY ENTERED INTO.

3 AND HE LOOKED AT WHAT ADOBE REQUIRES THEMSELVES,  
4 5.5 PERCENT, AND CONSIDERED THAT 2.5 PERCENT WAS LESS THAN  
5 HALF OF THAT.

6 AND THAT'S HOW HE CAME UP WITH A REASONABLE ROYALTY  
7 FIGURE. AND WE WOULD ASK THAT YOU CONSIDER THAT EVIDENCE AND  
8 YOU CONSIDER YOUR ANSWER TO THIS QUESTION.

9 BUT I ALSO NEED TO TALK TO YOU ABOUT VALIDITY. THIS  
10 CONCEPT THAT ADOBE IS ARGUING THAT EVEN THOUGH MR. PATTERSON  
11 WORKED ON THIS IDEA DECADES AGO, WORKED ON IT FOR YEARS. IT  
12 SPENT YEARS IN THE PATENT OFFICE AND ULTIMATELY WAS GRANTED BY  
13 THE UNITED STATES PATENT OFFICE, THAT AFTER ALL THIS TIME, ALL  
14 OF A SUDDEN HIS PATENTS ARE INVALID. SHOULDN'T BE CONSIDERED.  
15 NEED TO BE THROWN OUT.

16 AND IT'S THEIR BURDEN TO PROVE THIS TO YOU. CLEAR AND  
17 CONVINCING EVIDENCE, A VERY HIGH STANDARD OF PROOF. AND THE  
18 EVIDENCE HAS SHOWN THAT THEY HAVE FAILED TO MEET THEIR BURDEN.

19 THE EVIDENCE HAS SHOWN THAT AFTER WORKING FOR THREE YEARS  
20 DR. WICKER CONCEDED HE COULDN'T IDENTIFY A SINGLE REFERENCE,  
21 NOT ONE, THAT TEACHES ALL THE ELEMENTS OF THE SIX ASSERTED  
22 CLAIMS. AND HE WAS LOOKING. HE DIDN'T GIVE YOU AN OPINION  
23 THAT ANY ONE OF THOSE CLAIMS WAS ANTICIPATED. AND HE ADMITTED  
24 THAT ADOBE WAS FORCED TO COBBLE TOGETHER MULTIPLE REFERENCES  
25 IN ORDER TO ALLEGE THAT:



1 "OH, THIS WAS OBVIOUS. YOU TAKE THIS PATENT OVER HERE, A  
2 FEW PIECES OF IT, AND YOU TAKE THIS PATENT OVER HERE, A FEW  
3 PIECES OF THIS, IT IS ABSOLUTELY OBVIOUS."

4 THAT MR. PATTERSON SHOULD HAVE KNOWN THAT. THAT THE  
5 PATENT OFFICE SHOULD HAVE KNOWN THAT. THAT THE PATENTS NEVER  
6 SHOULD HAVE BEEN GRANTED.

7 THE EVIDENCE ISN'T THERE FOR THAT. PROFESSOR SCHULL  
8 CONFIRMED THAT HIS SYSTEM GENERATES THE PASSWORD AT THE  
9 SERVER, TRANSMITS IT AND STORES IT IN PRECISELY THE SAME  
10 STATE. THAT NOTHING HAPPENS.

11 ADOBE IS TRYING TO CONFUSE THESE ISSUES BY REFERENCING TO  
12 ENCRYPTION AND DECRYPTION THAT OCCUR IN PARTS OF THE SCHULL  
13 PROCESS THAT AREN'T RELEVANT TO ANY OF THE ASSERTED CLAIMS.

14 ADOBE COULDN'T IDENTIFY ANY REFERENCE THAT TAUGHT TRACKING  
15 IN THE WAY -- IN THE EXACT WAY CLAIMED BY THE '670 PATENT.

16 AND, FINALLY, THE BEST ADOBE COULD DO WAS TRY TO TRICK  
17 DR. KELLER WITH A REFERENCE FROM A BACKGROUND SECTION OF THE  
18 SCHULL PATENT THAT WAS TALKING ABOUT OTHER SYSTEMS, NOT  
19 SCHULL.

20 ADOBE HAS FAILED TO MEET THEIR BURDEN.

21 AT THIS POINT, MEMBERS OF THE JURY, I WANT TO GO OVER THE  
22 VERDICT FORM AND TELL YOU THE ANSWERS THAT DIGITAL REG THINKS  
23 THE EVIDENCE SUPPORTS; THAT THE DOCUMENTS, THE CODE, AND THE  
24 CLAIMS SUPPORT.

25 AND WHEN I DO THAT I ALSO WANT TO MENTION SOMETHING THAT

1 CAME UP IN OPENING STATEMENT. IT HAS BEEN A THEME THROUGHOUT  
2 THIS TRIAL. AND I WANT TO JUST TAKE A MOMENT TO ADDRESS IT.

3 YOU WERE ASKED IN OPENING STATEMENT BY ADOBE'S LAWYER  
4 THAT, WELL, THERE IS TWO KINDS OF CASES IN PATENT LAW. THERE  
5 IS A BIG COMPANY VERSUS ANOTHER BIG COMPANY. THAT'S ONE KIND  
6 OF A CASE. AND THEN, THERE'S ANOTHER KIND OF CASE WHERE IT IS  
7 A BIG COMPANY VERSUS A SMALL COMPANY THAT MAYBE WASN'T AS  
8 SUCCESSFUL.

9 WHICH KIND OF CASE IS THIS? THEY ASKED YOU TO THINK ABOUT  
10 THAT.

11 NOWHERE IN THE VERDICT FORM ARE YOU GOING TO BE ASKED FOR  
12 THAT QUESTION, BECAUSE THERE IS NO LAW THAT SAYS A BIG COMPANY  
13 IS TREATED ANY DIFFERENTLY THAN A SMALL COMPANY. YOU'RE NOT  
14 GOING TO BE ABLE TO ASK THAT QUESTION -- ANSWER THAT QUESTION,  
15 BECAUSE IT IS NOT AN ISSUE IN THIS CASE. DIGITAL REG IS  
16 PROTECTED BY THE UNITED STATES PATENT LAWS, JUST LIKE EVERYONE  
17 ELSE.

18 NOW, THE VERY FIRST QUESTION YOU WILL BE ASKED IS  
19 INFRINGEMENT. IS THERE DIRECT INFRINGEMENT? HAS DIGITAL REG  
20 PROVEN IT IS SIMPLY MORE LIKELY TRUE THAN NOT TRUE THAT ADOBE  
21 HAS INFRINGED ANY OF THE FOLLOWING CLAIMS?

22 AND THE FIRST QUESTION YOU WILL BE ASKED IS ABOUT THE '670  
23 PATENT IN CLAIM 45, ADOBE ACTIVATION.

24 DR. DEVANBU, THROUGH HIS REVIEW OF THE DOCUMENTS AND THE  
25 CODE AND ANALYZING THE CLAIMS TELLS YOU THAT THE ANSWER IS:

1 YES.

2 NOW, NEXT YOU WILL BE ASKED ABOUT DIRECT INFRINGEMENT AND  
3 HAS THE ADOBE LIVECYCLE PRODUCT INFRINGED THE '670 PATENT,  
4 CLAIM 45, AND THE '670 PATENT, CLAIM 52 DIRECTLY.

5 AND REMEMBER WHEN I HAD MR. HERBACH ON THE STAND AND I WAS  
6 ASKING HIM QUESTIONS? I ASKED HIM:

7 "DOES ADOBE USE LIVECYCLE ITSELF?"

8 AND HIS ANSWER WAS: "YES."

9 THEY USE THE PRODUCT THEMSELVES. IF YOU FIND IT  
10 INFRINGES, THEN THE ANSWER IS: YES. IT'S DIRECT INFRINGEMENT  
11 BY ADOBE.

12 AND AFTER YOU ANSWER THE DIRECT INFRINGEMENT QUESTIONS,  
13 YOU WILL BE ASKED THE INDIRECT INFRINGEMENT QUESTIONS. THOSE  
14 ARE THE ONES INVOLVING THE CUSTOMERS. HAS DIGITAL REG PROVEN  
15 IT IS MORE LIKELY THAN NOT THAT ADOBE INDIRECTLY INFRINGED ANY  
16 OF THE FOLLOWING CLAIMS?

17 YOU WILL REMEMBER SOME OF THE WITNESSES TRIED TO SAY THAT  
18 THEY WEREN'T REALLY INSTRUCTING THEIR USERS HOW TO USE THE  
19 SOFTWARE. THOSE WHITE PAPERS AND HELP PAGES DIDN'T MEAN  
20 ANYTHING. BUT THEY UNDERSTAND THAT THE CUSTOMERS ARE AN  
21 IMPORTANT PART OF THIS PROCESS, AND THAT THEY INSTRUCT THESE  
22 CUSTOMERS AND ARE IN CONCERT WITH THE CUSTOMERS INDIRECTLY  
23 INFRINGE EACH OF THE CLAIMS.

24 DR. DEVANBU WENT THROUGH THE CODE OF THE '541 PATENT AND  
25 TOLD YOU DEFINITELY THAT: YES, ADOBE ACTIVATION IS

1 INFRINGED. AND THERE WAS NO EVIDENCE SUPPORTED BY DR. WICKER  
2 AGAINST ANY OF HIS OPINIONS REGARDING THE DEPENDENT CLAIMS.

3 THE SAME CAN BE SAID FOR THE TRACKING PATENT. DR. DEVANBU  
4 TESTIFIED THAT THE TRACKING PATENT, THE '670 PATENT, IS  
5 INFRINGED BY ADOBE ACTIVATION.

6 NEXT YOU ARE GOING TO BE ASKED ABOUT FLASH. THAT CONTENT  
7 PROTECTED FLASH THAT THE HOLLYWOOD STUDIOS USE. AND IS IT  
8 MORE LIKELY THAN NOT THAT ADOBE INDIRECTLY INFRINGED EACH OF  
9 THOSE CLAIMS? ONCE AGAIN, BASED ON THE DOCUMENTS, BASED ON  
10 THE CODE AND BASED ON THE CLAIMS, THE ANSWER IS: YES.

11 AND THAT THE INDEPENDENT CLAIM OF THE '541 IS INFRINGED.  
12 YOU DIDN'T HEAR EVIDENCE FROM DR. WICKER THAT THE DEPENDENT  
13 CLAIMS WERE NONINFRINGED. YOU ONLY HEARD EVIDENCE FROM  
14 DIGITAL REG.

15 WE ALSO WENT THROUGH THE LIVECYCLE PRODUCTS. LIVECYCLE,  
16 YOU SAW PRODUCT MANUALS. YOU HEARD TESTIMONY. AND, ONCE  
17 AGAIN, YOU HEARD THAT IT WAS MORE LIKELY TRUE THAN NOT TRUE  
18 THAT CLAIM 1 OF THE '541 PATENT WAS INFRINGED. AND THAT CLAIM  
19 45 OF THE '670 PATENT, ALONG WITH ITS DEPENDENT CLAIM, WERE  
20 ALSO INFRINGED. THE ANSWER TO THOSE QUESTIONS IS: YES.

21 NEXT YOU WILL BE ASKED ABOUT INVALIDITY. AND WHEN YOU ARE  
22 ASKED ABOUT INVALIDITY, I WANT YOU TO THINK BACK TO DR. KELLER  
23 AND HIS TESTIMONY, HOW HE TALKS TO YOU ABOUT HOW NOT ALL THE  
24 REFERENCES WERE CONSIDERED, AND THE ONES THAT WERE SCHULL, IT  
25 DIDN'T INCLUDE ALL OF THE ELEMENTS. AND THEY HAVE TO INCLUDE

1 THOSE ELEMENTS TO BE FOUND INVALID.

2 HE THEN DID THE SAME THING FOR THE '670 PATENT. AND ONCE  
3 AGAIN TALKED ABOUT HOW THIS COMBINATION THAT WAS SO OBVIOUS TO  
4 ADOBE ISN'T OBVIOUS AT ALL. IT DOESN'T IN COMBINATION  
5 INVALIDATE THE '670 PATENT.

6 SO WHEN YOU ARE FILLING OUT YOUR VERDICT FORM, CONFIRM  
7 WHAT THE PATENT OFFICE HAS ALREADY SAID TWICE: PATRICK  
8 PATTERSON INVENTED THE '541 PATENT AND THE '670 PATENT. IT  
9 WASN'T OBVIOUS, AND NO ONE BEAT HIM TO IT.

10 THE ANSWER AS TO WHETHER THE '670 PATENT WAS ANTICIPATED  
11 IS: NO.

12 THE ANSWER AS TO WHETHER THE '541 AND THE '670 PATENTS  
13 WERE OBVIOUS, WHEN YOU COBBLE TOGETHER DIFFERENT PIECES OF  
14 PATENTS AND MISHMASH THEM ALL INTO ONE, THE ANSWER THERE IS:  
15 NO.

16 NOW, AT THIS POINT YOU WILL READ THIS QUESTION: IF YOU  
17 FOUND THAT AT LEAST ONE PRODUCT INFRINGES AT LEAST ONE VALID  
18 PATENT, AND YOU ANSWERED "YES," WELL, THEN YOU MOVE ON TO THE  
19 REMAINING QUESTIONS. AND THE FIRST QUESTION YOU WILL BE ASKED  
20 IS DAMAGES.

21 AND I TALKED ABOUT THE METHODOLOGY THAT WE'VE ESTABLISHED  
22 ABOUT HOW WE CAME UP WITH OUR ROYALTY RATE BASING IT OFF OF  
23 BOTH LICENSES THAT WE'VE ENTERED INTO AND LICENSE AGREEMENT  
24 RATES THAT ADOBE PUTS OUT THERE. AND HOW OURS WAS LESS THAN  
25 HALF OF WHAT THEY PUT OUT THERE THEMSELVES.

1 SO WE ASK YOU TO FILL IN THAT RATE AT 2.5 PERCENT, AND TO  
2 FOLLOW THE PATH THAT YOU'VE HEARD OF DURING THE CASE ABOUT HOW  
3 THERE'S \$2.066 BILLION OF A TOTAL ACCUSED REVENUE FOR ALL OF  
4 THE PRODUCTS. BUT GO AHEAD AND APPLY THAT INDUSTRY STANDARD  
5 DISCOUNT. KNOCK 70 PERCENT OF THAT NUMBER AWAY. AND THAT  
6 GETS THE NUMBER FOR WHICH YOU COMPUTE THE ROYALTY RATE TO  
7 619,860,000.

8 THAT WOULD MEAN THE DAMAGES AWARD IS \$15,496,500 FOR THE  
9 INFRINGEMENT THAT DIGITAL REG HAS SUFFERED AT THE HANDS OF  
10 ADOBE. ADOBE, WHO THEY REACHED OUT TO TO TRY TO FORM A  
11 BUSINESS RELATIONSHIP. THEY HAD A MEETING. THEY GAVE THEM  
12 DOCUMENTS. AND ADOBE TOLD THEM "NO."

13 THAT'S WHAT ADOBE OWES.

14 THE FINAL QUESTION THAT YOU WILL BE ASKED ON YOUR VERDICT  
15 FORM, MEMBERS OF THE JURY, IS WILLFULNESS. AND AS YOU  
16 CONSIDER THAT QUESTION I WANT YOU TO CONSIDER THE MOUNTAIN OF  
17 EVIDENCE THAT YOU'VE SEEN OF NOTICE AFTER NOTICE AFTER NOTICE  
18 BY ADOBE'S OWN PATENTS WHERE WE HAD TESTIMONY THAT THEIR  
19 IN-HOUSE LAWYERS WERE INVOLVED IN THE PROCESS.

20 WE HAD TESTIMONY THAT THEIR CORPORATE REPRESENTATIVE SAT  
21 ON A PATENT REVIEW BOARD THAT WORKED WITH ENGINEERS TO  
22 DETERMINE WHETHER OR NOT IDEAS WERE PATENTABLE. CONSIDER WHAT  
23 ADOBE KNEW AND WHEN THEY KNEW IT. AND CONSIDER THE CONTENT  
24 AND THE DISCUSSIONS BETWEEN MR. VENTERS AND ADOBE VENTURES  
25 ABOUT THE ADOBE VALUE PROPOSITION AND HOW IT SPECIFICALLY

1 IDENTIFIED THIS '670 PATENT BY NAME, AND THE '541 PATENT BY  
2 NUMBER.

3 THE ANSWER TO WHETHER OR NOT ADOBE'S INFRINGEMENT WAS  
4 WILLFUL IS: YES. THEY SHOWED A RECKLESS DISREGARD. I WANT  
5 TO THANK YOU FOR ALL YOUR TIME AND ATTENTION DURING THE LAST  
6 WEEK-AND-A-HALF IT HAS BEEN AN HONOR TO PRESENT THIS CASE IN  
7 FRONT OF YOU. AND THANK YOU FOR YOUR TIME.

8 AND I'M GOING TO HAVE A CHANCE TO GET UP HERE AFTER  
9 ADOBE'S HAD THEIR CLOSING ARGUMENT AND TALK TO YOU FOR JUST A  
10 FEW MINUTES MORE TO RESPOND TO SOME OF THEIR ARGUMENTS AND TO  
11 WRAP THINGS UP.

12 BUT AS ADOBE'S LAWYERS GO THROUGH THEIR ARGUMENTS, THINK  
13 ABOUT WHAT ADOBE KNEW AND WHEN THEY KNEW IT. THINK ABOUT THE  
14 DOCUMENTS, THE CODE AND THE CLAIMS. BECAUSE IF YOU FOCUS ON  
15 THOSE THINGS YOU WILL FIND THAT THE ANSWER THAT THE LAW  
16 REQUIRES IN THIS CASE IS A VERDICT FOR THE PLAINTIFF, DIGITAL  
17 REG.

18 **THE COURT:** ALL RIGHT. WE WILL TAKE OUR BREAK. IT'S  
19 10:25. WE WILL BREAK UNTIL 10:40. I WOULD LIKE TO SEE THE  
20 ATTORNEYS FOR JUST A MOMENT.

21 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

22 **THE COURT:** SO I HAVE TWO NOTES. ONE SAYS JUROR 608,  
23 MICHAEL BANE, HAS A MEDICAL PROCEDURE FRIDAY, SEPTEMBER 5TH AT  
24 7 A.M. TO 7:30 A.M. IN SAN JOSE.

25 "IT IS LIKELY A 1.5 HOUR DRIVE TO THE COURTHOUSE.

1 HOPEFULLY I CAN BE HERE BY NINE A.M."

2 THEN, I HAVE ANOTHER NOTE:

3 "TODAY AND TOMORROW I HAVE COMMITMENTS FOR WORK MADE BASED  
4 ON A RECESS TIME OF 1:30 P.M." THAT IS AARON O'DELL, WHO IS  
5 JURY NUMBER THREE. SO, MAYBE YOU CAN TALK ABOUT THIS AMONGST  
6 YOURSELVES. ONE SOLUTION IS TO EXCUSE BOTH OF THEM. IT WILL  
7 CUT INTO OUR DELIBERATION TIME. WE ONLY NEED SIX. WE WOULD  
8 STILL HAVE SEVEN. WE WOULD BE MORE LIKELY TO HAVE UNANIMITY,  
9 PERHAPS, AND LESS LIKELY TO HAVE A MISTRIAL OR HUNG JURY IF WE  
10 HAVE FEWER JURORS WHO HAVE TO AGREE. SO YOU MIGHT DECIDE  
11 LET'S JUST EXCUSE THOSE TWO. AND IF WE DON'T EXCUSE THOSE  
12 TWO, WE CERTAINLY HAVE TO LET THE MEDICAL GUY HAVE HIS MEDICAL  
13 APPOINTMENT. I CAN INQUIRE FURTHER INTO THIS WORK COMMITMENT,  
14 BUT WE COULD JUST LET THAT HAPPEN AND LIKELY THAT THE CASE  
15 WOULDN'T BE DECIDED AS QUICKLY.

16 SO UNLESS YOU KNOW RIGHT OFF THE BAT FOR SURE WHAT YOU  
17 WANT TO DO, YOU CAN THINK ABOUT IT AND LET ME KNOW AT THE END  
18 OF THE BREAK. I WOULD WANT TO TELL THEM AT THE END OF THE  
19 CLOSING ARGUMENT, BECAUSE I SHOULDN'T LET THEM START  
20 DELIBERATING WITH EXCESS PEOPLE IF WE ARE GOING TO EXCUSE THEM  
21 RIGHT AWAY. SO WE NEED TO DECIDE BEFORE DELIBERATIONS START.

22 **MR. REINES:** YOUR HONOR, A QUICK ISSUE ON THE VERDICT  
23 FORM?

24 **THE COURT:** YES.

25 **MR. REINES:** THE QUESTIONS, IF I HAVE IT RIGHT,



1       CONTAIN AN EXCESSIVE -- AN EXCESS NUMBER. SO IT STATES  
2       "THREE, FOUR AND FIVE" WHEN IT SHOULD BE FOUR. THIS IS AT  
3       PAGE 4, LINE 19.

4               **MS. GLAUSER:** I THINK WHEN WE REMOVED THE WRITTEN  
5       DESCRIPTION QUESTION THE NUMBERING DIDN'T GET FIXED IN THE  
6       PARAGRAPH THAT SAYS:

7               "IF YOU ANSWERED 'YES' TO ONE AND TWO, AND 'NO' TO THREE  
8       AND FOUR, THEN MOVE ON."

9               IT SHOULD BE TO FIVE AND SIX.

10              **THE COURT:** OH, I SEE WHAT YOU ARE SAYING.

11              OKAY. I WILL FIX THAT.

12              **MR. REINES:** THANK YOU.

13       (RECESS TAKEN AT 10:25 A.M. AND RESUMED AT 10:40 A.M.)

14       (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

15              **THE CLERK:** REMAIN SEATED COME TO ORDER COURT IS BACK  
16       IN SESSION.

17              **THE COURT:** SO THIS BOOK IS NOT -- I DON'T KNOW IF  
18       I'M MISUNDERSTANDING. THIS BOOK ISN'T GOING INTO EVIDENCE.

19              WHAT I WANT -- WHAT I SAID COULD GO INTO EVIDENCE IS A  
20       PIECE OF PAPER THAT SAYS EXCERPTS OF ADOBE SOURCE CODE, BUT IT  
21       WOULD ONLY HAVE THE LINES THAT WERE ON -- WHAT'S HIS NAME'S  
22       SLIDE. LIKE A THREE-PAGE DOCUMENT AT MOST, NOT ALL THE SOURCE  
23       CODE.

24              **MR. REINES:** WE REMINDED THEM OF THAT.

25              **THE COURT:** OKAY.

1           **MR. DINOVO:** SO TAKING A SINGLE LINE IS LIKE TAKING A  
2 LINE OUT OF A BOOK. YOU CAN'T --

3           **THE COURT:** THAT'S WHAT IT'S GOING TO BE.

4           OKAY.

5           **THE CLERK:** READY FOR JURY?

6           **THE COURT:** YOU DON'T HAVE TO HAVE IT AT ALL, BUT I  
7 TOLD YOU FROM THE BEGINNING WE ARE NOT GOING TO HAVE A WHOLE  
8 BOOK OF SOURCE CODE THAT NOBODY CAN READ. SO, NO, ABSOLUTELY  
9 NOT.

10          **THE CLERK:** WE ARE READY FOR YOU.

11          (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)

12          **THE COURT:** I'M SORRY. DID YOU REACH ANY AGREEMENT  
13 ON THAT MATTER WE TALKED ABOUT?

14          **MR. REINES:** WE ARE GOING TO LEAVE IT AS IS.

15          **THE COURT:** OKAY.

16          PLEASE BE SEATED. YOU MAY PROCEED.

17          **MS. MEHTA:** THANK YOU, YOUR HONOR.

18          **THE COURT:** NOW, I OFTEN REMIND PEOPLE WHEN THEY ARE  
19 RUNNING CLOSE TO THEIR TIME, BUT SINCE I DON'T KNOW HOW YOU  
20 HAVE DIVIDED IT UP, I WON'T BE ABLE TO DO THAT.

21          **MS. MEHTA:** I THINK WE WILL BE ABLE TO TAKE CARE OF  
22 THAT OURSELVES. THANK YOU, THOUGH.

23                           **CLOSING ARGUMENT**

24          **MS. MEHTA:** GOOD MORNING.

25          THE FIRST THING I WANT TO DO IS THANK YOU AGAIN FOR YOUR

1 TIME AND YOUR ATTENTION OVER THE LAST TWO WEEKS.

2 I THANKED YOU FOR IT IN ADVANCE, AND NOW I CAN SAY, AFTER  
3 HAVING WATCHED YOU OVER THE LAST TWO WEEKS, THAT I KNOW YOU  
4 HAVE BEEN PAYING ATTENTION, YOU'VE BEEN TAKING NOTES, AND WE  
5 REALLY APPRECIATE IT BECAUSE, AS I EXPLAINED DURING THE  
6 OPENING, THIS IS AN IMPORTANT CASE FOR ADOBE.

7 MR. ELLWANGER MADE A POINT DURING HIS CLOSING OF REMINDING  
8 YOU OF A QUESTION THAT I ASKED YOU TO ASK YOURSELVES DURING  
9 THE OPENING. BUT I THINK HE MAY HAVE MISREMEMBERED WHAT I  
10 ACTUALLY SAID.

11 THIS IS NOT A CASE ABOUT BIG COMPANIES VERSUS SMALL  
12 COMPANIES OR BIG COMPANIES VERSUS BIG COMPANIES. WHAT I TOLD  
13 YOU DURING THE OPENING WAS THAT I WANTED YOU TO LISTEN FOR THE  
14 EVIDENCE TO SEE WHAT TYPE OF PATENT CASE THIS WAS.

15 AND I DESCRIBED THAT THERE ARE TWO DIFFERENT KIND OF  
16 PATENT CASES. NOTHING TO DO WITH BIG COMPANIES OR SMALL  
17 COMPANIES.

18 THE CASES HAVE TO DO WITH ACTUAL INNOVATION AND ACTUAL  
19 INVENTION. AND WHAT I ASKED YOU TO LISTEN FOR WAS EVIDENCE  
20 ABOUT WHETHER THIS WAS THE FIRST TYPE OF CASE, WHERE THERE'S A  
21 REAL INVENTION WHERE SOMEONE REALLY CAME UP WITH SOMETHING  
22 NEW, AND THEN WORKED TO MAKE IT HAPPEN, AS PROFESSOR SCHULL  
23 SAID, TAKING THE INVENTION AND THEN PUTTING IN THE TIME AND  
24 THE MONEY AND MAKING AN INNOVATION. AND WHETHER IT WAS THAT  
25 KIND OF A CASE AND WHETHER IT WAS A CASE WHERE SOMEBODY TOOK

1 THAT TECHNOLOGY AND THEN TRIED TO COMPETE; WHETHER IT WAS A  
2 CASE ABOUT TECHNOLOGY.

3 AND THEN I DESCRIBED THAT THERE WERE ANOTHER KIND OF CASE,  
4 DIFFERENT PATENT CASES. CASES THAT ARE NOT ABOUT REAL  
5 INVENTION OR REAL INNOVATION. THEY ARE CASES ABOUT SOMEBODY  
6 THAT HAS A PATENT AND THE DEFENDANT THAT HAS A PRODUCT OR SET  
7 OF PRODUCTS THAT MAKE MONEY, AND A PLAINTIFF THAT WANTS A CUT  
8 OF THAT; CASES THAT ARE ABOUT MONEY. AND I ASKED YOU TO  
9 LISTEN CAREFULLY OVER THE COURSE OF THE TWO WEEKS TO HELP  
10 YOURSELVES FIGURE OUT WHAT THIS CASE IS.

11 I KNOW YOU HAVE BEEN PAYING ATTENTION, SO I KNOW THAT  
12 YOU'VE SEEN THE TESTIMONY FROM MR. FARLEY. REMEMBER, HE WAS  
13 THE MONEY GUY FOR DIGITAL REG. HE'S NOT A TECHNOLOGIST. HE'S  
14 THE MONEY GUY. AND WHAT HE SAID WAS, THEY'VE BEEN TRYING TO  
15 TAKE THE PATENT THAT THEY HAVE, THAT PATENT THAT MR. ELLWANGER  
16 WAS SHOWING YOU ON DAY ONE, AND MAKE SOMETHING OF IT FOR  
17 YEARS. AND THEY HAVEN'T BEEN SUCCESSFUL.

18 AND MR. VENTERS EXPLAINED, THE MARKETING GUY, THAT THEY  
19 HAVE HAD THIS PATENT AND THEY HAVE BEEN TRYING TO MAKE  
20 SOMETHING OUT OF IT FOR YEARS.

21 AND ASIDE FROM THE SETTLEMENTS THAT YOU'VE SEEN OVER THE  
22 COURSE OF THE CASE, THEY HAVEN'T MADE ANYTHING FROM THE  
23 PATENT.

24 SO THEN ASK YOURSELVES, WHEN YOU GO BACK INTO THAT JURY  
25 ROOM, IS THIS A CASE ABOUT TECHNOLOGY AND ABOUT WHETHER THERE

1 WAS A REAL INVENTION AND A REAL QUESTION AS TO WHETHER ADOBE  
2 IS USING THAT INVENTION, OR WHETHER THIS IS JUST A CASE ABOUT  
3 MONEY.

4 NOW, IN ORDER TO HELP YOU CONSIDER THAT QUESTION AND  
5 DECIDE THESE ISSUES, WHEN YOU GO BACK INTO THE JURY ROOM, I  
6 PRESENTED TO YOU TWO KEY ISSUES IN THE OPENING. AND THOSE TWO  
7 KEY ISSUES ARE STILL THE KEY ISSUES IN THE CASE.

8 THE FIRST I ASKED YOU TO THINK ABOUT, AND WE HAVE HEARD SO  
9 MUCH TESTIMONY AND EVIDENCE ABOUT IT OVER THE LAST TWO WEEKS,  
10 IS WHETHER THE ADOBE PRODUCTS AT ISSUE ARE IDENTICAL TO THE  
11 CLAIMS OF THE PATENTS-IN-SUIT.

12 AND THE SECOND QUESTION THAT I ASKED YOU TO ASK YOURSELVES  
13 AND CONSIDER IS, DID MR. PATTERSON REALLY INVENT THIS IDEA OF  
14 PROTECTING ELECTRONIC CONTENT AND COPYRIGHTABLE MATERIALS OR  
15 WAS IT PROFESSOR SCHULL WHO WAS THINKING ABOUT THE VERY SAME  
16 THING AND DOING THE VERY SAME THING YEARS BEFORE.

17 SO THOSE ARE THE TWO QUESTIONS I ASKED YOU TO CONSIDER  
18 OVER THE LAST TEN DAYS. AND YOU'VE DONE THAT. I KNOW YOU  
19 HAVE BEEN PAYING ATTENTION. I WOULD ASK YOU TO GO BACK AND  
20 REVIEW YOUR NOTES AND DISCUSS THOSE ISSUES.

21 WHILE YOU'RE DELIBERATING, THERE ARE OTHER QUESTIONS THAT  
22 HAVE COME UP OVER THE COURSE OF THE LAST TEN DAYS THAT I WOULD  
23 ALSO ASK YOU TO PLEASE CONSIDER. THE FIRST OF THOSE IS  
24 ACTUALLY ONE THAT MR. ELLWANGER INTRODUCED IN THE OPENING AND  
25 THAT HE RE-INTRODUCED TODAY. AND AS I TOLD YOU IN THE

1 OPENING, WE AGREE COMPLETELY THAT THIS IS A KEY ISSUE IN THE  
2 CASE. WHAT DID THEY KNOW AND WHEN DID THEY KNOW IT?

3 BUT ASK YOURSELVES THAT QUESTION NOT ONLY FOR ADOBE, BUT  
4 ALSO FOR DIGITAL REG. WHAT DID MR. FARLEY KNOW? WHAT DID  
5 MR. VENTERS KNOW, AND WHEN DID THEY KNOW IT? AND THEN ASK  
6 YOURSELF THAT QUESTION FOR PROFESSOR SCHULL. WHAT DID HE KNOW  
7 ABOUT THE PROBLEM OF PROTECTING ELECTRONIC CONTENT AND WHEN  
8 DID HE KNOW THE SOLUTION? AND HOW DOES THAT COMPARE TO WHAT  
9 WE HEARD FROM MR. PATTERSON. THESE ARE GOING TO BE KEY  
10 ISSUES.

11 ANOTHER KEY ISSUE THAT'S COME UP OVER THE COURSE OF THE  
12 LAST TEN DAYS, CREDIBILITY. CREDIBILITY. YOU HAVE SEEN FOR  
13 YOURSELF IN PERSON, LIVE, IN FULL COLOR ALL OF THE TESTIMONY  
14 OF THE PEOPLE ON BOTH SIDES OF THE STORY.

15 AND THE REASON THAT WE'VE ASKED YOU HERE AND WE HAVE TAKEN  
16 YOU AWAY FROM YOUR LIVES FOR THE LAST TWO WEEKS IS SO YOU CAN  
17 CONSIDER THE TESTIMONY OF ALL OF THOSE PEOPLE AND WHETHER OR  
18 NOT THE TESTIMONY IS CREDIBLE.

19 AND THEN THE FINAL THING, AFTER YOU WEIGH THESE FOUR  
20 QUESTIONS, THAT I WOULD ASK YOU TO CONSIDER BASED ON ALL THE  
21 EVIDENCE YOU'VE SEEN AND YOUR ANALYSIS OF THESE FOUR QUESTIONS  
22 IS, FAIRNESS.

23 WHAT IS THE RIGHT OUTCOME IN THIS CASE? WHAT IS FAIR?  
24 DID ADOBE REALLY DO ANYTHING WRONG? IS THIS REALLY A CASE  
25 ABOUT TECHNOLOGY OR IS THIS JUST A CASE ABOUT MONEY?

1 NOW, THE WAY WE HAVE DECIDED TO SPLIT THINGS UP SO YOU  
2 GUYS DON'T GET TOO SICK OF ME, IS I'M GOING TO ADDRESS THE  
3 FIRST TWO QUESTIONS. I'M GOING TO ADDRESS THE QUESTION ABOUT  
4 WHETHER THE ADOBE PRODUCTS WORK IDENTICALLY TO THE CLAIMS OF  
5 THE PATENT AND I'M GOING TO ADDRESS THE INVALIDITY ISSUES.  
6 AND THEN MY COLLEAGUE, MR. REINES, WHO YOU HAVE ALSO GOTTEN TO  
7 KNOW OVER THE LAST TWO WEEKS, HE'S GOING TO TALK TO YOU ABOUT  
8 THE LAST THREE QUESTIONS.

9 SO LET'S START WITH WHAT IS THIS CASE NOT ABOUT, AND THEN  
10 WE CAN TALK ABOUT QUESTION 1.

11 SO I GAVE YOU THE FIVE THINGS THAT WE WOULD SUBMIT THIS  
12 CASE IS ABOUT, THE FIVE QUESTIONS THAT WE WOULD ASK THAT YOU  
13 TAKE THE TIME TO CONSIDER.

14 WHAT THE CASE IS NOT ABOUT, AND THIS HAS BECOME ABUNDANTLY  
15 CLEAR OVER THE LAST TEN DAYS, IS THIS IS NOT A CASE ABOUT  
16 STOLEN PROPERTY. IT WAS THE FIRST LINE YOU HEARD LAST MONDAY.  
17 GUESS WHAT? THE EVIDENCE JUST DOESN'T STACK UP. THIS IS NOT  
18 A CASE ABOUT STOLEN PROPERTY.

19 THIS IS NOT A CASE ABOUT THE ADOBE PATENTS THAT WERE ALL  
20 GRANTED OVER THE DIGITAL REG PATENTS, ABOUT THE ADOBE PATENTS  
21 THAT REFLECT THE HARD WORK OF PEOPLE LIKE MR. HERBACH AND  
22 MR. BETLEM.

23 AND IT'S NOT A CASE ABOUT SUPERFICIAL EVIDENCE OR  
24 ARGUMENTS. IT'S NOT ABOUT GOING THROUGH A STACK OF DOCUMENTS  
25 AND HIGHLIGHTING THE WORD "TRACK" WHENEVER IT APPEARS. OR A

1 TETRIS GAME OF PATTERSON, PATTERSON, PATTERSON THAT ARE JUST  
2 PICKED OUT OF A DOCUMENT.

3 THE JOB THAT YOU'RE HERE TO DO, AS YOU'VE BEEN INSTRUCTED  
4 BY THE COURT, IS TO CONSIDER THE CLAIMS OF THE PATENT AND THEN  
5 CONSIDER THE EVIDENCE AND THE TESTIMONY THAT'S BEEN PRESENTED  
6 TO YOU OVER THE LAST TEN DAYS AS TO WHETHER OR NOT THE CLAIMS  
7 OF THE PATENT SUPPORT THE CLAIMS THAT DIGITAL REG IS NOW  
8 MAKING IN THE LITIGATION.

9 LET'S START WITH THE FIRST QUESTION. THAT'S INFRINGEMENT.  
10 '541 PATENT, AND THEN WE WILL GO TO THE '670 PATENT.

11 NOW, MR. ELLWANGER, WHEN HE WAS TALKING ABOUT INVALIDITY,  
12 MENTIONED THE BURDEN OF PROOF. WHAT HE DIDN'T TALK ABOUT WAS  
13 THE BURDEN OF PROOF ON INFRINGEMENT. ON INFRINGEMENT, DIGITAL  
14 REG BEARS THE BURDEN OF PROOF. THEY MUST PROVE THAT ADOBE'S  
15 PRODUCTS INFRINGE.

16 AND TO PROVE THAT ADOBE'S PRODUCTS INFRINGE, WHAT THE  
17 COURT'S INSTRUCTION TELLS YOU IS THAT YOU NEED TO CONSIDER AND  
18 COMPARE THE ADOBE PRODUCTS WITH THE REQUIREMENTS OF THE CLAIM.  
19 AND IN ORDER FOR DIGITAL REG TO PROVE THAT THERE'S  
20 INFRINGEMENT, THEY HAVE TO PROVE THAT EVERY REQUIREMENT OF THE  
21 CLAIM IS MET.

22 NOW, THIS IS THE CLAIM. I KNOW YOU GUYS HAVE BECOME  
23 INTIMATELY FAMILIAR WITH IT. AND YOU ARE PROBABLY EXCITED TO  
24 FORGET ABOUT IT AFTER THIS WHOLE PROCEEDING, BUT BEFORE YOU  
25 CAN FORGET ABOUT IT, I WOULD ASK YOU TO SPEND JUST A LITTLE



1 BIT MORE TIME THINKING HARD ABOUT IT.

2 HAVE THEY ACTUALLY PROVEN THAT THE CLAIM IS MET? NOW,  
3 DURING MR. ELLWANGER'S CLOSING, HE PUT THE CLAIM UP, HE  
4 POINTED TO IT, HE TALKED ABOUT HOW THERE'S ACCESS CHECKING,  
5 AND ALL OF THAT, BUT WHAT HE DIDN'T TALK ABOUT ARE THE  
6 ELEMENTS OF THE CLAIM THAT THEY HAVEN'T PROVEN. THE ONES THAT  
7 WE HAVE BEEN FOCUSED ON FOR THE LAST TEN DAYS. THE THINGS  
8 THAT HE OMITTED ARE THE THINGS THAT ARE AT THE VERY HEART OF  
9 THE DISPUTE.

10 DURING THE OPENING, I TOLD YOU THAT THERE WERE GOING TO BE  
11 TWO KEY ISSUES FOR YOU TO DECIDE ON THIS PATENT. AND I THINK  
12 YOU CAN TELL FROM THE EVIDENCE, THAT THOSE ARE THE TWO KEY  
13 ISSUES THAT ARE IN DISPUTE. YOU DIDN'T HEAR ANYTHING  
14 SUBSTANTIVE FROM MR. ELLWANGER ON THOSE ISSUES. YOU DID NOT  
15 HEAR ANY SUBSTANCE ON WHY THOSE TWO ELEMENTS ARE ACTUALLY MET  
16 BY THE ADOBE PRODUCTS.

17 HE TOLD YOU TO FOCUS ON THE CODE AND THE DOCUMENTS. WE  
18 DON'T DISAGREE WITH THAT. THE CODE AND THE DOCUMENTS ARE  
19 IMPORTANT.

20 GUESS WHAT? THERE'S NO DISPUTE BETWEEN THE EXPERTS ON THE  
21 CODE OR THE DOCUMENTS OR THE BASIC FUNCTIONING OF THE SYSTEM.

22 THE QUESTION THAT IS IN YOUR HANDS IS WHETHER OR NOT WHEN  
23 YOU LOOK AT THE CODE, WHEN YOU LOOK AT THE DOCUMENTS, AND THEN  
24 YOU ANALYZE IT THE WAY THAT DR. DEVANBU AND DR. WICKER WERE  
25 SUPPOSED TO ANALYZE IT, WHETHER THOSE -- THAT CODE AND THOSE

1 DOCUMENTS ACTUALLY MAP TO THE LIMITATIONS OF THE CLAIM.

2 AND THAT'S WHERE YOU HEARD NOTHING FROM MR. ELLWANGER. IN  
3 FACT, HE'S GOING TO GET A CHANCE TO COME UP HERE AND TELL YOU  
4 MORE ABOUT ALL OF THIS WHEN HE CLOSES IN REBUTTAL. LISTEN  
5 CAREFULLY FOR ANY EVIDENCE FROM DR. DEVANBU THAT ADOBE MEETS  
6 THESE REQUIREMENTS.

7 LISTEN CAREFULLY TO SEE IF HE CAN POINT YOU TO ANY  
8 TESTIMONY TO THAT EFFECT. AS I'M GOING TO SHOW YOU IN JUST A  
9 MINUTE, HE'S NOT GOING TO BE ABLE TO DO IT BECAUSE IT'S NOT  
10 THERE.

11 SO LET'S TALK ABOUT THE FIRST REQUIREMENT. THE YES/NO  
12 TOKEN. WE HAVE BEEN OVER THIS A LOT. BUT THINK BACK  
13 CAREFULLY TO WHEN WE STARTED TALKING ABOUT THE YES/NO TOKEN  
14 LAST WEEK.

15 AND WHEN WE STARTED TALKING ABOUT THE YES/NO TOKEN, THE  
16 QUESTION WAS RAISED WITH DR. DEVANBU BY MR. DINOVO ON HIS  
17 DIRECT EXAMINATION.

18 WHEN YOU WERE APPLYING THE COURT'S CLAIM CONSTRUCTION,  
19 THAT MEANS WHEN YOU WERE MAKING THE DECISION AS TO WHETHER OR  
20 NOT YOU THOUGHT ADOBE INFRINGED, WHEN YOU WERE FORMING YOUR  
21 OPINION ON INFRINGEMENT, WERE YOU APPLYING A CONSTRUCTION THAT  
22 HAD A YES/NO REQUIREMENT?

23 AND DR. DEVANBU SAID NO. HE DIDN'T CONSIDER THE YES/NO  
24 REQUIREMENT.

25 AND THEN THE NEXT DAY, YOU HEARD FROM THE COURT. YOU

1 HEARD FROM THE COURT THAT IN FACT, THE COURT'S CONSTRUCTION OF  
2 TOKEN CONTAINS A YES/NO INDICATOR. IT REQUIRES A YES OR NO.  
3 THE VERY THING THAT DR. DEVANBU SAID HE DIDN'T EVEN CONSIDER,  
4 THE COURT MADE CLEAR WAS A REQUIREMENT OF THE CLAIMS.

5 NOW, WHAT THE COURT SAID IS, YOU HAVE TO DISREGARD ANY  
6 TESTIMONY THAT THAT'S NOT A REQUIREMENT. AND YOU WILL SEE IN  
7 YOUR JURY INSTRUCTIONS THAT THE COURT'S INSTRUCTION OF THE  
8 TERM "TOKEN" REQUIRES A YES/NO INDICATOR.

9 NOT SURPRISINGLY SINCE HE DIDN'T EVEN CONSIDER THE  
10 REQUIREMENT, DR. DEVANBU HAS NO EVIDENCE THAT THAT INDICATOR  
11 IS REQUIRED.

12 DR. WICKER DID CONSIDER THE REQUIREMENT. AND WHEN HE  
13 CONSIDERED THE REQUIREMENT, HE EXPLAINED IN DETAIL OVER THE  
14 COURSE OF HIS EXAMINATION THAT THE REQUIREMENT IS NOT MET.  
15 IT'S NOT MET.

16 SO WE HAVE DR. WICKER SAYING, LOOK, IT'S NOT THERE, AND  
17 DR. DEVANBU, WHO IS THEIR EXPERT ON AN ISSUE THAT THEY BEAR  
18 THE BURDEN OF PROOF ON, SAYING HE DIDN'T EVEN CONSIDER IT.

19 AS I TOLD YOU WE WOULD PROVE IN THE OPENING, ADOBE DOESN'T  
20 HAVE A YES/NO INDICATOR AS REQUIRED BY THE CLAIMS.

21 LET'S TALK ABOUT THE SECOND LIMITATION OF THE '541. THE  
22 SECOND ISSUE, THE KEY ISSUE IN DISPUTE, AND THIS IS A SECOND  
23 INDEPENDENT GROUND FOR NONINFRINGEMENT. SO ONE INDEPENDENT  
24 GROUND FOR NONINFRINGEMENT IS THAT THERE'S NO YES/NO INDICATOR  
25 AND THEY HAVEN'T EVEN PROVIDED ANY EVIDENCE THAT THERE IS.

1 A SECOND ISSUE THAT WE TEE'D UP DURING THE OPENING AND HAS  
2 BEEN A FOCUS OF THE TESTIMONY, COMPLETELY INDEPENDENT IS THERE  
3 IS NO PERMISSION THAT'S GENERATED AT THE CLIENT. WE'VE HEARD  
4 A LOT ABOUT GENERATING AT THE CLIENT, GENERATING AT THE  
5 SERVER.

6 WELL, WHAT THE CLAIM SAYS, THE CLAIM SAYS, AND THIS IS THE  
7 KEY THING THEY HAVE TO PROVE, THAT THE PERMISSION IS GENERATED  
8 AT THE CLIENT. AND THE COURT'S CLAIM CONSTRUCTION MAKES CLEAR  
9 THAT THE INSTALLATION PROGRAM CREATES THE PERMISSION LOCALLY.

10 WHEN YOU GO BACK AND LOOK AT THE JURY INSTRUCTIONS, READ  
11 THAT INSTRUCTION. IT MAKES CLEAR THAT THE PERMISSION HAS TO  
12 BE CREATED LOCALLY; THAT'S AT THE CLIENT, NOT AT THE SERVER.

13 WELL, THIS ISN'T JUST AN INSUBSTANTIAL THING. IT'S NOT  
14 JUST A LITTLE THING THAT WE CAN HAVE WAVE OUR HANDS AND  
15 PRETEND ISN'T IMPORTANT. AS WE SHOWED THROUGHOUT THE LAST TWO  
16 WEEKS, THIS IS A KEY ELEMENT OF THE CLAIMS.

17 YOU DON'T GET TO JUST PUT A BOARD UP THERE AND SAY, WELL,  
18 IT'S HERE, WITHOUT ACTUALLY PROVING THAT IT'S THERE BECAUSE  
19 THIS WAS IMPORTANT. THIS WAS IMPORTANT BECAUSE WHEN DIGITAL  
20 REG GOT THE PATENTS, THEY TOLD THE PATENT OFFICE THAT THE  
21 THING THAT MAKES THEM DIFFERENT OVER THE PRIOR ART -- THAT'S  
22 THE WOLFE PATENT, YOU HAVE THAT IN THE JURY ROOM, IT'S EXHIBIT  
23 679 -- THE THING THAT MAKES THEM DIFFERENT OVER THE WOLFE  
24 PATENT AND ALL THIS OTHER PRIOR ART IS THAT THEY ARE  
25 GENERATING THE PERMISSION AT THE CLIENT AND NOT AT THE CENTRAL

1 COMPUTER.

2 AND DR. WICKER EXPLAINED, WHEN HE REVIEWED THE FILE  
3 HISTORY, WHEN HE LOOKED AT THE EVIDENCE, WHAT IT SHOWS IS THAT  
4 THE PERMISSION IS GENERATED LOCALLY, NOT AT THE SERVER. THE  
5 CLAIM SAYS IT, THE COURT'S CLAIM CONSTRUCTION SAID IT, AND  
6 DIGITAL REG SAID IT WHEN THEY GOT THE PATENT.

7 BUT THAT'S NOT WHERE THE EVIDENCE STOPS. MR. PATTERSON  
8 HIMSELF WAS DESCRIBING HIS CLIENT CENTRIC APPROACH, AND HE  
9 SAID, LOOK, THE CONTROLLING PROCESS FOR PROTECTING THE  
10 CONTENT, THAT'S PERFORMED AT THE CLIENT, NOT AT THE SERVER.

11 AND MR. VENTERS, AND WE ARE GOING TO HEAR MORE ABOUT  
12 MR. VENTERS LATER, BUT THAT ADOBE VALUE PROPOSITION DOCUMENT  
13 THAT HE SAYS HE SENT TO ADOBE? WHETHER HE SENT IT OR NOT, THE  
14 THING HE CLAIMS HE SENT TO ADOBE HIGHLIGHTED THE CLIENT  
15 CENTRIC ASPECT OF THE INVENTION.

16 IN FACT, WHEN HE SAYS HE WAS TELLING ADOBE ABOUT THE  
17 INVENTION, WHAT HE WAS TELLING THEM WAS, WE ARE CLIENT CENTRIC  
18 AND WE STAND IN CONTRAST TO PEOPLE THAT ARE DOING IT AT THE  
19 SERVER, AND THAT'S AN IMPORTANT COMPONENT OF OUR INVENTION.  
20 CLIENT CENTRIC GENERATED AT THE CLIENT, GENERATED LOCALLY.

21 YOU'VE SEEN THESE ANIMATIONS BEFORE SO WE ARE NOT GOING TO  
22 RUN THROUGH THE WHOLE THING. BUT I JUST WANT TO REMIND YOU OF  
23 SOMETHING.

24 REMEMBER DR. WICKER'S TESTIMONY. AND REMEMBER HOW HE  
25 SHOWED YOU HOW THE DIGITAL REG PATENTS WORK AND HOW THOSE

1 GEARS THAT REFLECT THE GENERATING OF THE PERMISSION, THE SAME  
2 GEAR THAT DR. KELLER USED TO SHOW PERMISSION GENERATION, THOSE  
3 GEARS IN THE PATENT, THEY ARE AT THE CLIENT BECAUSE IT'S  
4 CLIENT CENTRIC.

5 AND IN THE ADOBE PRODUCTS, THOSE GEARS, THE PROCESS OF  
6 GENERATING THE THING THAT THEY CLAIM IS THE PERMISSION, THOSE  
7 ARE AT THE SERVER. THEY ARE NOT AT THE CLIENT.

8 THEY ARE EXACTLY STANDING IN CONTRAST TO THE CLIENT  
9 CENTRIC APPROACH IN JUST THE WAY MR. VENTERS WAS TRYING TO  
10 SHOW THAT DISTINCTION.

11 SO WHAT'S THE EVIDENCE? THE EVIDENCE IS, AND, AGAIN,  
12 NEITHER EXPERT DISPUTES HOW THE PRODUCT WORKS IN TERMS OF THE  
13 RELEVANT FUNCTIONALITY. THEY DON'T DISPUTE THE CODE OR THE  
14 DOCUMENTS. WHAT THEY DISPUTE IS THE APPLICATION OF THE CLAIM  
15 AND THE CLAIM CONSTRUCTION.

16 AND WHAT DR. WICKER SAYS IS, LOOK, FOR ALL THREE OF THE  
17 ADOBE PRODUCTS, THE KEY, THE THING THAT'S BEING POINTED TO AS  
18 THE PERMISSION GENERATED AT THE SERVER AND THEN IT'S PASSED TO  
19 THE CLIENT.

20 WELL, GUESS WHAT? YOU HEARD DR. DEVANBU, ALTHOUGH HE  
21 DIDN'T ADMIT IT ON DIRECT EXAMINATION, AND HE TRIED TO SUGGEST  
22 THAT THERE WAS SOME GENERATION HAPPENING AT THE CLIENT, ON  
23 CROSS-EXAMINATION WHEN WE PUT THE QUESTIONS TO HIM, AND I  
24 ASKED HIM POINT BLANK, WHERE THE GENERATION'S HAPPENING? HE  
25 EXPLAINED FOR ALL THREE OF THE PRODUCTS, THE GENERATING IS

1 HAPPENING AT THE SERVER, AND THEN THE THING THAT HE IS  
2 POINTING TO IS THE PERMISSION IS BEING PASSED TO THE CLIENT.

3 LET'S LOOK AT HIS TESTIMONY. FOR THE ACTIVATION PRODUCT,  
4 HE'S POINTING TO THE E-LICENSE AS THE PERMISSION.

5 AND I SAID, THAT'S GENERATED AT THE SERVER.

6 CORRECT.

7 AND IT'S JUST PASSED TO THE CLIENT?

8 CORRECT.

9 FLASH ACCESS: THE CEK, THE KEY THAT HE'S POINTING TO AS  
10 THE PERMISSION, THAT EXISTS AT THE SERVER BEFORE IT GOES TO  
11 THE CLIENT. IT WAS GENERATED AT THE SERVER.

12 AND FOR LIVECYCLE RIGHTS MANAGEMENT: THE ENCRYPTED KEY  
13 THAT HE'S POINTING TO IS THE PERMISSION.

14 GUESS WHAT? THAT ALSO EXISTED AT THE SERVER AND WAS  
15 GENERATED THERE BEFORE IT WAS PASSED TO THE CLIENT.

16 SO FOR ALL THREE PRODUCTS, HE ADMITTED POINT BLANK THAT  
17 HIS CODE REVIEW, HIS REVIEW OF THE DOCUMENTS, AND HIS REVIEW  
18 OF THE DEPOSITION TESTIMONY CONFIRMS EXACTLY WHAT DR. WICKER  
19 WAS SAYING. IT'S DONE AT THE SERVER AND NOT AT THE CLIENT.  
20 THIS IS NOT CLIENT CENTRIC. IT DOESN'T FALL WITHIN THE SCOPE  
21 OF THE CLAIMS.

22 SO, YOU WOULD THINK, GIVEN THOSE ADMISSIONS, THAT YOU  
23 SHOULDN'T ALL BE HERE STILL. SO HOW DO THEY CONTINUE TO URGE  
24 YOU TO FIND INFRINGEMENT NOTWITHSTANDING THE ADMISSIONS OF  
25 THEIR OWN EXPERT? HOW CAN THEY DO IT?

1 WELL, THEY CAME UP WITH A THEORY. AND THE THEORY IS THAT,  
2 YES, IT EXISTED AT THE CLIENT -- SORRY. IT EXISTED AT THE  
3 SERVER AND WAS GENERATED THERE, AND GOT PASSED TO THE CLIENT,  
4 BUT WE'RE GOING TO ENCRYPT IT BEFORE WE PASS IT. AND THAT THE  
5 PROCESS OF ENCRYPTING IT AND SENDING IT OVER AND THEN  
6 DECRYPTING IT MEANS YOU ARE SOMEHOW REGENERATING IT OR  
7 RE-CREATING IT AT THE CLIENT.

8 WELL, WE PROBED THAT A LITTLE BIT ON CROSS-EXAMINATION  
9 WITH DR. DEVANBU. AND WHAT DR. DEVANBU ADMITTED WAS,  
10 ENCRYPTION AND DECRYPTION ASIDE -- I AM GOING TO TALK ABOUT  
11 THAT IN A SECOND -- THE KEY, THE THING THAT THEY POINT TO AS  
12 THE PERMISSION, IT WAS GENERATED AT THE CLIENT AND IT EXISTED  
13 THERE. AND THE EXACT SAME THING IS WHAT'S BEING USED AT  
14 THE -- I'M SORRY, I MISSPOKE. IT WAS GENERATED AT THE SERVER  
15 AND EXISTED THERE, AND THE EXACT SAME THING IS BEING USED AT  
16 THE CLIENT.

17 SO, WHAT DOES THE ARGUMENT BOIL DOWN TO? THE ARGUMENT  
18 BOILS DOWN TO AN ARGUMENT THAT IF YOU ENCRYPT SOMETHING AND  
19 THEN DECRYPT IT, YOU'VE RE-CREATED IT. THINK ABOUT WHAT THAT  
20 MEANS. YOU'VE ALL BOUGHT THINGS ONLINE, SHOPPED ONLINE AND  
21 YOU HAVE PUT YOUR CREDIT CARD INFORMATION ON TO A WEB PAGE.

22 AND GUESS WHAT HAPPENS TO YOUR CREDIT CARD INFORMATION  
23 BEFORE IT GOES TO AMAZON? IT GETS ENCRYPTED. AND THEN AMAZON  
24 DECRYPTS IT AND CHARGES YOUR CREDIT CARD. AMAZON IS NOT  
25 RE-CREATING OR REGENERATING YOUR CREDIT CARD. ALL THAT WAS



1 DONE WAS YOU PUT A LEVEL OF PROTECTION ON IT, YOU PACKAGE IT  
2 UP SO IT CAN BE SENT OVER, AND THEN THE VERY SAME THING THAT  
3 YOU PACKAGED UP, JUST GETS UNWRAPPED ON THE OTHER SIDE.

4 DR. WICKER EXPLAINED THAT TO YOU. HE EXPLAINED IN DETAIL  
5 THAT IT'S THE SAME KEY THAT'S GENERATED AT THE SERVER, THE  
6 EXACT SAME KEY THAT'S BEING USED AT THE CLIENT. AND  
7 ENCRYPTION AND DECRYPTION AREN'T CHANGING THE KEY, THEY'RE  
8 JUST PACKAGING IT UP SO IT CAN BE TRANSMITTED, THE SAME WAY  
9 ANY DATA HAS TO BE PACKAGED BEFORE YOU CAN TRANSFER IT OVER A  
10 NETWORK.

11 SO AFTER ALL OF THAT, AND CONSIDERING ALL OF THAT, WE  
12 WOULD ASK YOU TO GO BACK AND THINK HARD ABOUT THESE TWO  
13 QUESTIONS AND FIND THAT FOR THESE TWO INDEPENDENT REASONS AND  
14 FOR OTHER REASONS THAT YOU HEARD ABOUT OVER THE COURSE OF THE  
15 LAST TEN DAYS THAT I AM NOT GOING TO GET INTO TODAY, THAT  
16 ADOBE DOES NOT INFRINGE THE '541 PATENT. DIGITAL REG HAS NOT  
17 PROVED, THEY HAVE NOT MET THEIR BURDEN OF PROVING THAT THE  
18 PRODUCTS WORK THE SAME WAY.

19 NOW -- OR THE PRODUCTS WORK THE SAME WAY AS THE CLAIMS, I  
20 SHOULD SAY.

21 NOW, WITH RESPECT TO THE '670 PATENT, AGAIN, THEY BEAR THE  
22 BURDEN OF PROOF AND THEY HAVE TO PROVE THAT EVERY REQUIREMENT  
23 IS MET.

24 AND IN THE '670 PATENT, WE HEARD ABOUT CLAIM 45 AND A  
25 BUNCH OF DIFFERENT REQUIREMENTS, BUT I'M GOING TO FOCUS IN ON

1 TWO OF THEM. THE TWO REQUIREMENTS THAT I WANT TO FOCUS IN ON  
2 ARE THE REQUIREMENT THAT YOU DENY ACCESS UNTIL THE  
3 TRANSMISSION OF NOTIFICATION INFORMATION AND THEN SUCCESSIVE  
4 RECIPIENT.

5 SO, DENYING ACCESS UNTIL THE NOTIFICATION INFORMATION IS  
6 SENT. THIS IS SOMETHING THAT'S DESCRIBED IN THE PATENT. WE  
7 HEARD TESTIMONY ABOUT HOW IT IS DESCRIBED IN THE PATENT AND WE  
8 ALSO HEARD TESTIMONY ABOUT HOW IT WAS DESCRIBED IN THE FILE  
9 HISTORY.

10 AND MUCH THE SAME WAY AS THE WOLFE PATENT, WHEN THE  
11 PATENTEE WAS TRYING TO GET THE '670 PATENT, THERE WAS A  
12 DISCUSSION ABOUT ALL THE PRIOR ART THAT WAS OUT THERE AND WHAT  
13 MIGHT MAKE CLAIM 45 DIFFERENT. AND, AGAIN, WHAT THEY SAID  
14 WAS, WHAT MAKES US DIFFERENT IS THAT THE DENIAL OF ACCESS IS  
15 UP UNTIL THE POINT WHERE YOU SEND THE NOTIFICATION INFORMATION  
16 OUT. AND THEN THE GRANTING OF ACCESS IS TRIGGERED BY THE  
17 SENDING OUT OF THE NOTIFICATION INFORMATION.

18 AND WHAT THEY SAID WAS, THAT'S WHAT MAKES US DIFFERENT  
19 FROM THE PRIOR ART. BECAUSE IN THE PRIOR ART, YOU SEND STUFF  
20 OUT, BUT YOU HAVE TO GET SOMETHING BACK BEFORE YOU CAN HAVE  
21 ACCESS. SO OUR PATENT IS DIFFERENT BECAUSE WE ONLY SEND IT  
22 OUT AND WE DON'T GET ANYTHING BACK. THAT WAS WHY THEY SAID  
23 THEY WERE DIFFERENT FROM THE PRIOR ART.

24 AS DR. WICKER PUT IT, IT'S NOT THE SUCCESSFUL TRANSMISSION  
25 THAT DETERMINES WHETHER YOU HAVE ACCESS, IT'S GETTING THE KEY,

1 IT'S GETTING SOMETHING BACK FROM THE SERVER.

2 SO WHAT'S EVIDENCE -- AND MR. HERBACH OBVIOUSLY CONFIRMED  
3 THIS.

4 WHAT'S THE EVIDENCE? WELL, ONCE AGAIN, AND NOT  
5 SURPRISINGLY GIVEN THE EXPERTS AGREE ON THE CODE AND THE  
6 DOCUMENTS AND HOW THE PRODUCTS WORK BASICALLY, DR. DEVANBU WAS  
7 ASKED TO CONSIDER THIS ON DIRECT EXAMINATION. AND HE SAID,  
8 OH, YES, THE LIMITATIONS MET.

9 BUT ON CROSS-EXAMINATION HE CONFIRMED THAT IN THE ACCUSED  
10 PRODUCTS, THE ACCESS, THE THING THAT TRIGGERS THE ACCESS IS  
11 NOT THE SENDING OUT OF INFORMATION, IT'S GETTING THAT KEY  
12 BACK. IT'S GETTING SOMETHING BACK FROM THE SERVER.

13 SO, AGAIN, IN STARK CONTRAST TO WHAT'S CLAIMED IN THE  
14 CLAIMS.

15 AND WHAT HE SAID WAS, YOU HAVE TO GET SOMETHING BACK. SO  
16 FOR ALM, TOO, YOU DON'T HAVE ACCESS UNTIL YOU GET THAT LICENSE  
17 E-LICENSE BACK.

18 AND THEN MR. KELLER, THE EXPERT ON INVALIDITY. MR. KELLER  
19 EXPLAINED THAT FROM HIS PERSPECTIVE, IF YOU ACCESS THE  
20 TRIGGERING EVENT IS BASED ON GETTING SOMETHING BACK THE WAY IT  
21 WORKS IN THE ADOBE PRODUCTS, THAT WOULDN'T FIT HIS  
22 UNDERSTANDING OF THE CLAIMS.

23 SO, ACTUALLY, ALL THREE OF THE EXPERTS AGREE. THEY ALL  
24 AGREE. THE CLAIMS REQUIRE THAT YOU SEND SOMETHING OUT TO GET  
25 ACCESS, AND THEN DR. DEVANBU AND DR. WICKER AGREE THAT YOU

1 HAVE TO GET SOMETHING BACK.

2 SO THAT LIMITATION OF THE '670 IS NOT MET.

3 THERE'S A SECOND INDEPENDENT GROUND FOR NONINFRINGEMENT,  
4 AND THAT'S THE SUCCESSIVE RECIPIENT LIMITATION THAT'S IN THE  
5 CLAIMS. THERE'S OTHERS, BUT I'M ONLY GOING TO GIVE YOU THE  
6 TOP TWO, THE HIGHLIGHTS.

7 SUCCESSIVE RECIPIENT. WHAT THE PATENT CLAIMS IS SOMEBODY  
8 CREATES CONTENT AND THEN THEY SEND IT TO A USER. AND THEN  
9 THAT USER SENDS IT TO ANOTHER RECIPIENT. SO YOU HAVE A FIRST  
10 RECIPIENT AND YOU HAVE A SUCCESSIVE RECIPIENT.

11 AND WHAT THE COURT HAS CONSTRUED THOSE TERMS TO MEAN IS,  
12 THE USER THAT RECEIVES THE CONTENT AND THEN THE USER THAT  
13 RECEIVES IT FROM A PREVIOUS RECIPIENT. YOU WILL SEE THAT IN  
14 THE JURY INSTRUCTIONS.

15 WELL, YOU HEARD DR. DEVANBU EXPLAIN HIS INFRINGEMENT  
16 THEORY FOR ACTIVATION. AND WHAT HE SAID WAS, LOOK -- AND THIS  
17 IS DR. WICKER'S ILLUSTRATIVE TO SHOW HOW THE SYSTEM WORKS, BUT  
18 THERE'S NO REAL CONTEST ON HOW THE PRODUCT WORKS. YOU  
19 DOWNLOAD SOFTWARE, ONE PERSON DOWNLOADS IT, ANOTHER PERSON  
20 DOWNLOADS IT, ANOTHER PERSON DOWNLOADS IT.

21 DR. DEVANBU ADMITTED THAT HE'S NOT AWARE OF ANY INSTANCE  
22 IN WHICH ANYONE HAS ACTUALLY EVER TAKEN THAT DOWNLOADED  
23 SOFTWARE ON THEIR LAPTOP AND PUT IN ON A THUMB DRIVE OR SENT  
24 IT IN AN EMAIL TO SOMEBODY ELSE. HE HASN'T COME FORWARD WITH  
25 ANY EVIDENCE, AND YOU HAVEN'T HEARD ANY EVIDENCE FROM DIGITAL

1 REG THAT THAT'S NEVER HAPPENED. THERE IS NO EVIDENCE OF A  
2 SUCCESSIVE RECIPIENT FOR THE ACTIVATION PRODUCTS. IT'S JUST  
3 NOT THERE.

4 SO THAT LIMITATION IS NOT MET.

5 SO WHEN YOU GO BACK INTO THE JURY ROOM, I WOULD ASK YOU TO  
6 CAREFULLY CONSIDER THE CLAIM REQUIREMENTS. AND NOT THE CLAIM  
7 REQUIREMENTS THAT WERE NOT FOCUSED ON, AS MR. ELLWANGER WAS  
8 DOING DURING HIS CLOSING, BUT THE CLAIM REQUIREMENTS THAT WE  
9 HAVE FOCUSED ON, THE ONES THAT HAVE BEEN AT THE HEART OF THE  
10 TESTIMONY FOR THE LAST TEN DAYS.

11 AND I THINK WHAT YOU'LL FIND IS, THERE'S ACTUALLY  
12 REMARKABLE CONSISTENCY BETWEEN DR. DEVANBU AND DR. WICKER ON  
13 HOW THE PRODUCTS ACTUALLY WORK. THERE'S JUST ARGUMENT THAT'S  
14 LAYERED ON TOP OF THAT FROM DIGITAL REG THAT SOMEHOW THAT CAN  
15 MAP TO THE CLAIMS.

16 AND WE ASK YOU TO THINK REALLY HARD ABOUT WHETHER THAT  
17 ARGUMENT WORKS, AND WHETHER IT ACTUALLY COMPORTS WITH THE  
18 CLAIM LANGUAGE AND WITH WHAT'S REQUIRED UNDER THE COURT'S  
19 CLAIM CONSTRUCTIONS.

20 THERE'S ONE BRIEF SIDE NOTE THAT I WANT TO TAKE YOU ON  
21 INFRINGEMENT, WHICH IS WE TALKED A BIT ABOUT DIRECT  
22 INFRINGEMENT AND THE COURT INSTRUCTED YOU ON DIRECT  
23 INFRINGEMENT.

24 THE COURT ALSO INSTRUCTED YOU ON INDIRECT INFRINGEMENT.  
25 WHEN YOU GO BACK TO THE JURY ROOM AND YOU CONSIDER INDIRECT

1 INFRINGEMENT, WHAT YOU'RE BEING ASKED TO CONSIDER IS, EVEN IF  
2 ADOBE'S NOT INFRINGING, ARE WE GOING TO HOLD ADOBE LIABLE FOR  
3 THE INFRINGEMENT OF OTHERS.

4 FIRST, IN ORDER TO HOLD ADOBE LIABLE FOR THE INFRINGEMENT  
5 OF OTHERS, YOU HAVE TO FIND THAT SOMEONE IS INFRINGING. SO,  
6 IF YOU LOOK AT THOSE EXPLANATIONS FOR WHY WE ARE DIFFERENT  
7 THAN THE CLAIMS, YOU WOULD FIND THAT NOBODY IS INFRINGING  
8 BECAUSE OUR PRODUCTS ARE DIFFERENT, SO THERE CAN'T BE ANY  
9 DIRECT INFRINGEMENT, SO THERE CAN'T BE ANY INDIRECT  
10 INFRINGEMENT.

11 BUT IF YOU GET BEYOND THAT POINT, THEN YOU HAVE TO ASK  
12 YOURSELF, WHAT DOES IT TAKE TO HOLD ADOBE LIABLE FOR THE  
13 ACTIONS OF SOMEONE ELSE? AND THE COURT'S INSTRUCTIONS ON THAT  
14 ARE CLEAR. YOU HAVE TO FIND NOT ONLY THAT THE PRODUCTS  
15 INFRINGE AND THAT SOMEONE ELSE IS ACTUALLY USING THEM IN AN  
16 INFRINGING WAY, BUT ALSO THAT ADOBE INTENTIONALLY TOOK ACTIONS  
17 THAT INDUCED THAT INFRINGEMENT BY THE INDIVIDUALS OR THE  
18 COMPANIES THAT YOU FIND TO HAVE BEEN INFRINGING, THAT IT WAS  
19 AWARE OF THE PATENT, THAT IT KNEW THE ACTS IT WAS CAUSING  
20 WOULD BE INFRINGING, AND THAT IT DIDN'T HAVE A GOOD FAITH  
21 BELIEF THAT THE PATENTS WERE INVALID.

22 AND I'M NOT GOING TO GET INTO ALL OF THIS NOW BECAUSE  
23 MR. REINES IS GOING TO TALK ABOUT THIS A LOT LATER IN HIS  
24 PRESENTATION, ABOUT THE TIME LINE AND ABOUT WHAT REALLY  
25 HAPPENED AND WHAT THE EVIDENCE REALLY SHOWS, BUT WHEN YOU HEAR

1 THAT EVIDENCE ON THEIR ALLEGATION THAT ADOBE WAS WILLFUL, I  
2 WANT YOU TO CONSIDER THAT SAME EVIDENCE ON INDIRECT  
3 INFRINGEMENT.

4 BECAUSE ON INDIRECT INFRINGEMENT, THEY HAVE TO PROVE THAT  
5 ADOBE WAS DOING THIS INTENTIONALLY. THAT'S THE COURT'S CLAIM  
6 CONSTRUCTION. AND WE WOULD SUBMIT THAT THE EVIDENCE THAT  
7 SHOWS THAT ADOBE WAS NOT WILLFUL ALSO CONFIRMS THAT EVEN IF  
8 YOU WERE TO FIND INFRINGEMENT, WHICH WE DON'T THINK YOU CAN  
9 FIND ON THIS RECORD, IT WAS NOT INTENTIONAL AND, THEREFORE,  
10 THERE CAN BE NO INDIRECT INFRINGEMENT.

11 LET'S GO TO QUESTION 2, INVALIDITY. SO, YOU'LL READ THE  
12 JURY INSTRUCTIONS ON OBVIOUSNESS. THE KEY THING THAT I WOULD  
13 ASK YOU TO CONSIDER WHEN YOU'RE CONSIDERING OBVIOUSNESS, AND  
14 THE KEY ISSUE THAT YOU HAVE TO TAKE BACK FOR YOURSELVES IS,  
15 DR. WICKER IS NOT CONTENDING THAT THE SCHULL '070 PATENT IS  
16 IDENTICAL TO THE CLAIMS OF THE PATENT BECAUSE THE VERY  
17 DIFFERENCES THAT MAKE THE ADOBE PRODUCTS NONINFRINGEMENT, ALSO  
18 APPLY TO THE SCHULL PATENT. BUT THERE'S A DIFFERENT INQUIRY  
19 FOR INVALIDITY.

20 SO EVEN WHEN YOU FIND THAT THE ADOBE PRODUCTS ARE  
21 DIFFERENT AND THAT EVERY REQUIREMENT OF THE CLAIMS IS NOT  
22 PRESENT IDENTICALLY IN THE ADOBE PRODUCTS, YOU HAVE A  
23 DIFFERENT ANALYSIS THAT YOU NEED TO DO FOR INVALIDITY.

24 AND THAT ANALYSIS IS, EVEN IF SCHULL IS DIFFERENT FROM THE  
25 PATENTS FOR THE SAME REASONS THAT ADOBE IS, IN THE CONTEXT OF

1 INVALIDITY, WOULD IT BE OBVIOUS TO CHANGE SCHULL BACK IN THE  
2 DAY TO MAKE IT WORK LIKE THE CLAIMS.

3 NOW, YOU MAY BE THINKING TO YOURSELVES, OKAY, WELL, LET'S  
4 SAY WE FIND AS A GROUP THAT THERE'S NO INFRINGEMENT, WE CAN  
5 JUST GO HOME, WE DON'T HAVE TO WORRY ABOUT INVALIDITY.

6 INVALIDITY IS IMPORTANT IN THIS CASE. EVEN IF YOU FIND THAT  
7 ADOBE DOESN'T INFRINGE, WHICH WE THINK THE EVIDENCE WILL  
8 COMPEL YOU TO DO, WE'D ASK YOU TO REALLY TAKE A HARD LOOK AT  
9 THE INVALIDITY QUESTION. AND THERE'S A REASON FOR THAT.

10 YOU HEARD TESTIMONY THAT DIGITAL REG COULD SUE ADOBE AGAIN  
11 TOMORROW ON DIFFERENT PRODUCTS. AND DIGITAL REG COULD GO TO  
12 ANOTHER SOFTWARE COMPANY AND ANOTHER SOFTWARE COMPANY AND  
13 ANOTHER SOFTWARE COMPANY AND ASK FOR THEM TO ENTER INTO  
14 SETTLEMENTS.

15 IS IT RIGHT TO LET DIGITAL REG DO THAT IF THE PATENTS  
16 AREN'T VALID? WELL YOU HAVE THAT QUESTION BEFORE YOU NOW.  
17 ARE THE PATENTS VALID? AND WE WOULD ASK THAT YOU FIND THAT  
18 THEY AREN'T.

19 SO, BEFORE WE DO THAT, LET'S TALK ABOUT WHAT DIGITAL REG  
20 AGREES THEY DIDN'T INVENT. THEY AGREED THEY DID NOT INVENT  
21 DRM. DR. DEVANBU ADMITTED THAT. DR. KELLER ADMITTED THAT.  
22 DID NOT INVENT DRM.

23 YOU HEARD LOTS OF TESTIMONY ABOUT SUGGESTIONS THAT DRM IS  
24 CRITICAL AND VERY VALUABLE AND PEOPLE REALLY WANT IT. LET'S  
25 BE CLEAR ABOUT SOMETHING. MR. PATTERSON DID NOT INVENT DRM.



1 AND NOBODY, NONE OF THEIR EXPERTS ARE SAYING THAT HE DID.  
2 THIS WAS A CROWDED FIELD WITH LOTS OF PEOPLE WORKING IN THE  
3 SPACE.

4 SO YOU HAVE TO ASK YOURSELF, THESE SPECIFIC CLAIMS, THE  
5 SPECIFIC CLAIMS THAT HE SAYS HE INVENTED, WHAT'S ACTUALLY NEW  
6 ABOUT THEM? WHAT MAKES THEM NOVEL? OR WHAT MAKES THEM NOT  
7 OBVIOUS?

8 WELL, WE ASKED MR. KELLER, DR. KELLER IF SOME OF THESE  
9 CONCEPTS WERE OUT THERE. AND HE SAID, YES, THESE CONCEPTS  
10 WERE OUT THERE.

11 YOU HEARD YESTERDAY -- I ASKED HIM A WHOLE SERIES OF  
12 CONTENTS FOR THE PATENT CLAIMS, AND WHETHER THEY WERE KNOWN IN  
13 THE ART, AND HE SAID, YES, THAT WAS KNOWN, AND THAT WAS KNOWN,  
14 AND THAT WAS KNOWN.

15 SO THEN WE WENT TO THE SOURCE OF THE PATENTS THEMSELVES.  
16 AND WE ASKED MR. PATTERSON, WHAT'S NOVEL OR INNOVATIVE ABOUT  
17 YOUR PATENTS? AND HE COULDN'T TELL YOU.

18 MR. ELLWANGER MADE A LOT OF REFERENCES DURING HIS CLOSING  
19 TO MR. PATTERSON AND JULIAN LENNON AND PROTECTING COPYRIGHTED  
20 MATERIAL, AND ALL OF THAT.

21 WELL, YOU HEARD FROM DR. SCHULL, PROFESSOR SCHULL. HE WAS  
22 DOING THE EXACT SAME THING BEFORE MR. PATTERSON. HE CAME UP  
23 WITH THIS SOFTWARE PROGRAM IN HIS LAB, AND HE WANTED TO  
24 PROTECT THAT COPYRIGHTED CONTENT SO HE COULD DISTRIBUTE IT  
25 FREELY. HE WAS DOING THE EXACT SAME THING.

1           AND MR. PATTERSON GOT UP THERE AND HE TRIED TO TELL YOU  
2           ABOUT HIS WORK PAPERS, THAT HE COULDN'T REMEMBER A YEAR AGO IN  
3           DEPOSITION, BUT SUDDENLY REMEMBERED NOW. BUT AFTER ALL OF  
4           THAT, HE NEVER TOLD YOU WHAT WAS ACTUALLY NEW. DIGITAL REG  
5           HAS NEVER TOLD YOU WHAT THEY SAY IS ACTUALLY NEW.

6           AND YOU HEARD FROM DR. SCHULL HIMSELF THAT WHAT THEY ARE  
7           NOW SAYING WAS THE IDEA OF THIS PROTECTION OF COPYRIGHTED  
8           MATERIAL, IT WASN'T NEW, HE HAD ALREADY COME UP WITH IT.

9           SO LET'S TALK ABOUT DR. SCHULL AND THE SOFTLOCK SYSTEM FOR  
10          A SECOND. WE SHOWED YOU THE PATENT, AND THEN YOU HEARD  
11          EXTENSIVE TESTIMONY FROM DR. SCHULL ABOUT THE PROCESS THAT HE  
12          WENT THROUGH TO COME UP WITH THE IDEA AND THEN START TO WORK  
13          ON THE COMPANY AND INNOVATE AND MAKE IT INTO A PRODUCT.

14          AND WHAT HE TOLD YOU WAS, THAT HE HAD THE SAME IDEA, THE  
15          SAME MAGIC OF BEING ABLE TO DISTRIBUTE CONTENT FROM THE SERVER  
16          AND THEN HAVE IT PASS FROM PERSON TO PERSON BACK IN 1992,  
17          YEARS BEFORE MR. PATTERSON EVEN CLAIMS THAT HE THOUGHT OF THE  
18          IDEA.

19          IN FACT, WHAT HE TOLD YOU WAS, THAT HE GOT THIS PATENT IN  
20          1992. AND IF YOU LOOK AT THE TIME LINE -- I ASKED MR. KELLER,  
21          DO YOU HAVE ANY REASON TO QUIBBLE WITH THAT DATE? AND  
22          MR. KELLER SAID NO. THERE'S NO DISPUTE THAT MR. SCHULL'S --  
23          DR. SCHULL'S PATENT AND THE SOFTLOCK SYSTEM THAT HE DEVELOPED  
24          BASED ON THAT PATENT THAT HE THOUGHT OF THOSE IDEAS BACK IN  
25          1992, YEARS BEFORE DIGITAL REG'S FILING. YEARS BEFORE.

1 THERE'S NO DISPUTE ABOUT THAT.

2 SO THEN YOU HAVE TO ASK YOURSELVES, IF DR. SCHULL HAS BEEN  
3 DOING THIS AND HE HAD ALREADY HAD GOTTEN THE PATENT BEFORE  
4 MR. PATTERSON, WELL THEN HOW COME MR. PATTERSON HAVE GOTTEN  
5 HIS PATENT? THERE MUST BE SOMETHING NEW THERE, RIGHT? THE  
6 PATENT OFFICE JUST DOESN'T GIVE YOU A PATENT IF SOMEBODY ELSE  
7 HAS ALREADY DONE IT.

8 WELL, REMEMBER WHAT I TOLD YOU DURING THE OPENING. YOU  
9 NINE ARE THE FIRST PEOPLE TO EVER CONSIDER THE QUESTION OF  
10 WHETHER OR NOT MR. PATTERSON'S PATENTS ARE VALID OVER  
11 DR. SCHULL'S WORK.

12 DR. SCHULL'S PATENT WAS NOT CONSIDERED BY THE PATENT  
13 OFFICE WHEN IT GRANTED THE '541 PATENT AND IT WAS NOT  
14 CONSIDERED BY THE PATENT OFFICE WHEN IT GRANTED THE '670  
15 PATENT.

16 AND, IN FACT, NOBODY ELSE FROM THE PATENT OFFICE HEARD  
17 WHAT YOU HEARD FROM DR. SCHULL. HE DIDN'T GO TO THE PATENT  
18 OFFICE DURING PROSECUTION OF MR. PATTERSON'S PATENT AND SAY,  
19 THIS IS MY SYSTEM, THIS IS MY PATENT, THIS IS HOW IT WORKS.  
20 THEY DIDN'T KNOW ANYTHING ABOUT THE '070 PATENT AND THEY  
21 DIDN'T HEAR FROM DR. SCHULL. YOU'RE THE FIRST NINE PEOPLE TO  
22 GET TO ANSWER THAT QUESTION. AND IT'S AN IMPORTANT ONE. AND  
23 WE WOULD ASK YOU TO TAKE IT SERIOUSLY EVEN IF YOU FIND THAT  
24 THE PATENT'S NOT INFRINGED.

25 SO LET'S GET INTO THE MERITS NOW OF THE ANALYSIS. SO, WE

1 LOOK TO CLAIM 1 OF THE '541 PATENT, AND WHAT DR. WICKER TOLD  
2 YOU WAS, LOOK, UNDER THE PROPER INTERPRETATION OF THE CLAIMS,  
3 IT'S NOT ALL DISCLOSED IN SCHULL BECAUSE SCHULL GENERATES THE  
4 PERMISSION AT THE SERVER AND IT'S NOT CLIENT CENTRIC. HE  
5 ADMITTED THAT. THAT'S REASONABLE.

6 BUT WHAT HE TOLD YOU WAS, IT WOULDN'T HAVE BEEN A LEAP TO  
7 TAKE THE GENERATION OF THE SERVER -- OF THE CLIENT --  
8 PERMISSION AT THE SERVER AND MOVE IT TO THE CLIENT. THAT  
9 WOULD NOT HAVE BEEN A LEAP. THAT'S WHAT HE TOLD YOU.

10 WHAT DR. KELLER SAID WAS, LOOK, I'VE GOT ALL THESE REASONS  
11 WHY IT'S NOT MET, AND SHOWED YOU ALL THOSE X'S ON THE BOARD.  
12 BUT AT THE END OF THE DAY WHEN I ASKED HIM, ALL THOSE X'S,  
13 WHAT DO THEY BOIL DOWN TO? THEY JUST BOIL DOWN TO TWO THINGS.  
14 AND, ACTUALLY, REALLY ONLY ONE THING, WHICH IS HIS OPINION  
15 THAT AFTER EVERYTHING THAT DR. WICKER TOLD YOU ABOUT WHY  
16 SCHULL DISCLOSES EVERYTHING, THAT THAT ONE LIMITATION, THAT  
17 DR. KELLER'S OPINION BOILS DOWN TO THE ARGUMENT THAT, WELL,  
18 IT'S GENERATED AT THE SERVER AND PASSED TO THE CLIENT, SO IT  
19 CAN'T MEET THE CLAIMS.

20 THAT DOESN'T MAKE ANY SENSE. THAT'S EXACTLY WHAT DIGITAL  
21 REG IS SAYING THE ADOBE PRODUCTS DO. AND SO IF YOU LOOK AT  
22 THE TESTIMONY, AND YOU REALLY CONSIDER WHAT YOU HEARD LAST  
23 WEEK FROM DR. DEVANBU, AND THIS WEEK FROM DR. KELLER, WHO  
24 INCIDENTALLY DIDN'T TALK TO EACH OTHER, DIDN'T REVIEW EACH  
25 OTHER'S REPORTS AND DIDN'T EVEN KNOW HOW THEY WERE OPINING ON

1 THEIR DIFFERENT ISSUES BEFORE THEY OFFERED THEIR OPINIONS, HAD  
2 NO COORDINATION AT ALL, AND CAME INTO DIRECT CONFLICT WITH ONE  
3 ANOTHER.

4 WHAT DR. DEVANBU SAID WAS, LOOK, IT'S DONE AT THE SERVER,  
5 BUT WE ARE DECRYPTING IT. AND IF WE DECRYPT IT, THAT'S THIS  
6 REGENERATION THING. AND WHAT DR. KELLER SAID WAS, WELL, IN  
7 THE SCHULL PATENT, IT'S GENERATED AT THE SERVER, ENCRYPTED AND  
8 DECRYPTED, BUT THE DECRYPTION ISN'T ENOUGH, AND THAT'S WHY IT  
9 IS NOT MET BY SCHULL.

10 AND I WOULD ASK YOU TO CONSIDER CLOSELY WHETHER IT'S  
11 REASONABLE FOR DIGITAL REG TO COME IN AND SAY, WELL, FOR ADOBE  
12 THIS DECRYPTION PROCESS IS SOMEHOW REGENERATING, BUT FOR  
13 SCHULL IT'S NOT.

14 IS THAT RIGHT? CAN THEY REALLY DO THAT? CAN THEY REALLY  
15 HAVE IT BOTH WAYS FOR INFRINGEMENT AND INVALIDITY?

16 YOU WILL LOOK AT THE EVIDENCE, THE SCHULL PATENT'S IN THE  
17 RECORD. I URGE YOU TO LOOK AT IT. THIS IS FROM FIGURE 2.

18 FIGURE 2 IN THE SCHULL PATENT SHOWS THE PROCESS OF  
19 CREATING A PASSWORD AT THE SERVER, THEN ENCRYPTING IT,  
20 TRANSMITTING IT TO THE CLIENT, AND THEN DECRYPTING IT. LOOK  
21 AT THE FIGURE. IF WORKS JUST LIKE THE ADOBE PRODUCTS DO, JUST  
22 LIKE THE ADOBE PRODUCTS DO.

23 NOW, THIS RAISES THE QUESTION. SO LET'S SAY YOU FIND, AS  
24 I HOPE YOU WILL, THAT THEY CAN'T TALK OUT OF BOTH SIDE OF  
25 THEIR MOUTH, AND THAT DIGITAL REG HAS TO BE CONSISTENT, AND

1 YOU FIND ADOBE DOESN'T INFRINGE. WELL, THE SCHULL PATENT  
2 STILL INVALIDATES THE TWO DIGITAL REG PATENTS.

3 AND THE REASON IS THE OBVIOUSNESS POINT THAT I MADE  
4 EARLIER. I WANT TO HONE IN ON THE SPECIFIC EVIDENCE OF THAT  
5 NOW.

6 WITH RESPECT TO OBVIOUSNESS, WHAT DR. WICKER -- I'M SORRY,  
7 WHAT DR. SCHULL TOLD US WAS, YES, I DID IT AT THE SERVER, BUT  
8 IT WOULDN'T HAVE BEEN ANY STRETCH AT ALL BACK IN THE DAY TO DO  
9 THAT AT THE CLIENT, WHICH IS THE THING THAT DIGITAL REG SAID  
10 MADE THEM DIFFERENT. THAT WOULDN'T HAVE BEEN HARD. HE WOULD  
11 HAVE JUST MOVED THE CODE OVER.

12 AND DR. WICKER EXPLAINED THAT THAT MODIFICATION, THE ONE  
13 THING THAT'S DIFFERENT BETWEEN SCHULL AND THE PATENTS, THE  
14 ONLY THING THAT THEY HAVE IDENTIFIED AS BEING DIFFERENT, THAT  
15 THAT MODIFICATION, THAT WOULD HAVE BEEN KNOWN TO DO. THAT  
16 WOULD HAVE BEEN OBVIOUS TO PEOPLE OF ORDINARY SKILL IN THE  
17 ART? SOMEONE WITH A DEGREE IN COMPUTER SCIENCE AND SOME WORK  
18 EXPERIENCE, OR EVEN WITHOUT THE WORK EXPERIENCE, SOMEONE WITH  
19 A DEGREE IN COMPUTER SCIENCE WOULD KNOW THAT TAKING IT FROM  
20 THE SERVER AND MOVING IT TO THE CLIENT WAS NOT A LEAP. THAT  
21 WAS WELL WITHIN THE SKILLS OF A PERSON OF ORDINARY SKILL IN  
22 THE ART.

23 AND HE EXPLAINED THAT YOU WOULD BE MOTIVATED TO DO THAT.  
24 THERE'S REASONS AND KNOWLEDGE OF THE PEOPLE OF ORDINARY SKILL  
25 IN THE ART THAT WOULD ALLOW THEM TO DO THAT IF THEY WANTED TO

1 BECAUSE IT WAS KNOWN THAT YOU COULD OFFLOAD SOME OF THE  
2 PROCESS AND POWER FROM THE SERVER, SOME OF THE GEAR WORK THAT  
3 HAS TO BE DONE TO GENERATE THOSE PERMISSIONS, AND IF YOU  
4 WANTED TO DO IT IN THE WAY THAT MR. PATTERSON CHOOSES TO DO  
5 IT, WHICH IS AT THE CLIENT, YOU JUST MOVE IT OVER AND THE  
6 GEARS MOVE OVER TO THE CLIENT. THAT'S NOT A LEAP. THAT'S  
7 OBVIOUS.

8 AND DR. KELLER, HE TESTIFIED A LOT ABOUT HOW SCHULL WASN'T  
9 EXACTLY THE SAME AS THE PATENTS, WHICH WE AGREE WITH, BUT HE  
10 NEVER REBUTTED DR. WICKER'S OPINION THAT YOU COULD MODIFY  
11 SCHULL TO JUST MOVE IT OVER FROM THE SERVER TO THE CLIENT, AND  
12 THAT WOULD HAVE BEEN SOMETHING THAT WAS WITHIN THE SKILL OF  
13 SOMEONE IN THE ART. HE DIDN'T DENY THAT AT ALL. IT WAS JUST  
14 YESTERDAY. THINK BACK, LOOK AT YOUR NOTES, THERE WAS NO  
15 DENIAL OF THAT.

16 LET'S TALK ABOUT THE '670. '670 IS CLAIM 32, WHICH WE  
17 TALKED ABOUT YESTERDAY, AND CLAIM 45. AND WHAT WE SAW WHEN WE  
18 WERE TALKING ABOUT HOW THE PATENT WORKS WITH DR. WICKER WAS,  
19 THE CONCEPT OF THE CREATOR, AND THEN THE FIRST RECIPIENT AND  
20 THE SUCCESSIVE RECIPIENT AND ANOTHER SUCCESSIVE RECIPIENT.  
21 EACH OF THOSE RECIPIENTS SENDS THEIR NOTIFICATION INFORMATION  
22 BACK TO THE SERVER IN THE MIDDLE.

23 SCHULL, SOFTLOCK WORKS THE SAME WAY. LOOK AT EXHIBIT 624.  
24 IT'S GOING TO BE IN THE JURY ROOM FOR YOU. DR. SCHULL TALKED  
25 ABOUT IT YESTERDAY. IT'S A BROCHURE THAT SHOWS HOW THE SCHULL

1 INVENTION, THE ONE THAT'S IN THE PATENT, THE ONE THAT WAS IN  
2 HIS PRODUCTS, HOW IT WORKS. IT WORKS THE SAME WAY. IT HAS A  
3 CREATOR OF CONTENT SENDING INFORMATION TO A RECIPIENT THAT  
4 THEN CAN BE PASSED TO OTHER PEOPLE, AND YOU ARE SENDING  
5 INFORMATION BACK.

6 SO WITH THOSE SIMILARITIES, DR. WICKER SAID, LOOK, THERE'S  
7 ONE DIFFERENCE, WHICH IS THE KEY LIMITATION, THE "UNTIL"  
8 LIMITATION, THE DENYING ACCESS, WHAT'S TRIGGERING THE ACCESS.  
9 THE SAME ONE THAT'S THE KEY LIMITATION ON INFRINGEMENT IS THE  
10 KEY LIMITATION ON INVALIDITY.

11 DR. WICKER SAID THAT IS NOT DISCLOSED IN SCHULL FOR THE  
12 SAME REASONS IT'S NOT DISCLOSED IN THE ADOBE PRODUCTS, BUT IT  
13 WOULD HAVE BEEN OBVIOUS TO COMBINE SCHULL WITH GRISWOLD.

14 AND DR. KELLER SAID, LOOK, THESE THINGS ARE DIFFERENT.  
15 THEY'RE DIFFERENT FOR TWO REASONS. HE HAD THE CHART WITH ALL  
16 THE X'S, AND HE MARKED THEM ALL OFF.

17 BUT AT THE END OF DAY WHEN I ASKED HIM WHAT ALL THOSE X'S  
18 REALLY BOIL DOWN TO, JUST TWO REASONS, NOTIFICATION  
19 INFORMATION AND THE DENYING THE ACCESS UNTIL, WHAT IS THE  
20 TRIGGER EVENT FOR ACCESS.

21 ON NOTIFICATION INFORMATION, DR. KELLER DIDN'T APPLY THE  
22 COURT'S CLAIM CONSTRUCTION BECAUSE THERE WAS NONE. SO HE  
23 APPLIED HIS OWN INTERPRETATION OF NOTIFICATION INFORMATION.  
24 FAIR ENOUGH, EXCEPT HIS INTERPRETATION OF NOTIFICATION  
25 INFORMATION IS INCONSISTENT WITH DR. DEVANBU'S.



1 SO, FOR PROVING INFRINGEMENT BY ADOBE, DIGITAL REG AND  
2 DR. DEVANBU CLAIM THAT IF YOU JUST SEND OUT PERSONAL  
3 INFORMATION ABOUT THE USER, PERSONAL REGISTRATION INFORMATION,  
4 THAT THAT'S ENOUGH. BUT DR. KELLER, APPLYING HIS  
5 INTERPRETATION FOR INVALIDITY SAID THAT'S NOT ENOUGH. IT HAS  
6 TO BE USED FOR TRACKING.

7 THAT INCONSISTENCY CAN'T BE RECONCILED. YOU CAN'T HAVE IT  
8 BOTH WAYS.

9 LET'S ASSUME THAT YOU AGREE WITH DR. KELLER THAT  
10 NOTIFICATION INFORMATION DOES REQUIRE TRACKING. IN THAT CASE,  
11 DR. DEVANBU WOULDN'T HAVE PROVED INFRINGEMENT, SO THERE WOULD  
12 BE NONINFRINGEMENT. BUT THERE WOULD ALSO BE INVALIDITY.

13 AND THE REASON FOR THAT IS, AS DR. WICKER POINTED OUT, THE  
14 SCHULL PATENT DOES TEACH TRACKING. IT DOES TEACH TRACKING.  
15 AND THE THING THAT DR. KELLER SAID MADE TRACKING IMPORTANT,  
16 COLLECTING MARKETING INFORMATION SO THAT YOU CAN TRACK THE  
17 USERS, WELL, THE SCHULL PATENT TALKS ABOUT THAT, TOO.

18 RIGHT THERE IN THE BACKGROUND OF THE INVENTION WHEN THEY  
19 ARE EXPLAINING WHY YOU WOULD WANT TO USE THE SCHULL  
20 TECHNOLOGY, WHY THE PATENT WAS IMPORTANT, DR. SCHULL SAID,  
21 WELL, THIS INVENTION ALLOWS YOU TO TRACK INFORMATION SO THAT  
22 YOU'RE NOT LOSING VALUABLE INFORMATION ABOUT YOUR CUSTOMERS  
23 AND ABOUT THE MARKET.

24 SO THE VERY SAME REASON THAT DR. KELLER SAID THAT THIS  
25 NOTIFICATION INFORMATION AND TRACKING WAS IMPORTANT FOR THE

1 CLAIMS, THE SCHULL PATENT TEACHES THAT.

2 AND DR. KELLER ADMITTED ON CROSS-EXAMINATION THAT HE  
3 HADN'T CONSIDERED THAT. HE DIDN'T REFERENCE THAT DURING HIS  
4 DIRECT EXAMINATION.

5 WELL, YOU CAN LOOK AT IT. YOU WILL HAVE THE SCHULL PATENT  
6 IN EVIDENCE. IT'S EXHIBIT 418. AND I WOULD ASK YOU TO LOOK  
7 AT IT, AND LOOK AT WHETHER EXHIBIT 418 IS DIFFERENT THAN THE  
8 DIGITAL REG PATENTS AND WHETHER IT'S DIFFERENT THAN THE '670  
9 PATENTS. IT DOESN'T DIFFER WHEN IT COMES TO NOTIFICATION  
10 INFORMATION.

11 THE SECOND THING THAT DR. KELLER POINTED TO AS A  
12 DIFFERENCE WAS THIS CONCEPT OF TRIGGERING ACCESS. DO YOU  
13 TRIGGER ACCESS BASED ON SENDING SOMETHING OUT OR DO YOU NEED  
14 TO GET THE PERMISSION BACK, THE KEY BACK, THE ACKNOWLEDGMENT  
15 BACK. YOU HAVE TO GET SOMETHING BACK.

16 AND WHAT HE SAID WAS, LOOK, FROM MY PERSPECTIVE, I THINK  
17 YOU HAVE TO GET SOMETHING BACK. YOU HAVE TO GET A NETWORK  
18 ACKNOWLEDGMENT BACK, AND THAT'S WHY SCHULL IS DIFFERENT.

19 HE ADMITTED ON CROSS-EXAMINATION THAT THE COURT'S CLAIM  
20 CONSTRUCTION ACTUALLY DOESN'T HAVE ANY CONCEPT OF NETWORK  
21 ACKNOWLEDGMENT IN IT. AND WHEN YOU GO BACK TO THE JURY ROOM  
22 AND YOU LOOK AT THE CLAIM CONSTRUCTION, THE COURT'S  
23 CONSTRUCTION, THE COURT'S CONSTRUCTION MAKES CLEAR THAT THE  
24 PATENTED INVENTION GRANTS ACCESS IMMEDIATELY UPON THE ATTEMPT  
25 TO TRANSMIT NOTIFICATION, THAT'S THE SENDING, BUT WITHOUT

1 WAITING FOR A RESPONSE FROM THE SERVER. WITHOUT WAITING FOR A  
2 RESPONSE FROM THE SERVER.

3 SO THAT NETWORK ACKNOWLEDGMENT CONCEPT THAT DR. KELLER WAS  
4 TALKING ABOUT, THAT'S INCONSISTENT WITH THE COURT'S CLAIM  
5 CONSTRUCTION. SO LOOK AT THE COURT'S CLAIM CONSTRUCTION AND  
6 LOOK AT DR. KELLER'S ANALYSIS, AND ASK YOURSELVES IS SCHULL  
7 REALLY DIFFERENT WHEN YOU APPLY THE COURT'S CLAIM  
8 CONSTRUCTION? IT'S NOT.

9 NOW, LET'S ASSUME THAT DR. KELLER'S ANALYSIS, WE'RE SORT  
10 OF TAKING IT AT FACE VALUE, AND HE'S LOOKING AT WHETHER OR NOT  
11 THE GRISWOLD REFERENCE THAT DR. WICKER COMBINED WITH THE  
12 SCHULL REFERENCE, WHETHER THE GRISWOLD REFERENCE TEACHES  
13 GETTING ACCESS UPON SENDING SOMETHING OUT.

14 WELL, HE SAID IT DOESN'T. BUT I WOULD ASK YOU TO GO BACK  
15 AND LOOK AT THE GRISWOLD REFERENCE WHICH YOU ALREADY HAVE.  
16 YOU DON'T HAVE TO READ THE WHOLE THING. THERE HAVE BEEN KEY  
17 PASSAGES THAT HAVE BEEN POINTED OUT TO YOU IN DR. WICKER'S  
18 TESTIMONY. AND WHAT WICKER EXPLAINS AND WHAT THE PATENT SHOWS  
19 IS THAT YOU ARE SENDING THE REQUEST OUT, AND THAT YOU ARE  
20 TRYING ACCESS BASED ON THE SENDING WITHOUT WAITING FOR A  
21 RESPONSE FROM THE SERVER, WITHOUT WAITING TO GET SOMETHING  
22 BACK.

23 AND, AGAIN, ON THIS KEY QUESTION, CONSIDER CAN THEY HAVE  
24 IT BOTH WAYS? CAN DR. DEVANBU ADMIT THAT IN ORDER TO PRACTICE  
25 THE CLAIMS UNDER HIS READING FOR INFRINGEMENT, YOU HAVE TO

1 SEND SOMETHING OUT AND GET SOMETHING BACK, WHILE DR. KELLER IS  
2 SAYING, OH, NO, NO, NO, IF YOU SEND SOMETHING OUT AND GET  
3 SOMETHING BACK, THAT THAT'S NOT ENOUGH. CAN THEY REALLY BE  
4 CONSISTENT? THEY CAN'T.

5 DR. KELLER SAID IF GRANTING OF THE ACCESS IS BASED ON  
6 GETTING SOMETHING BACK, YOU HAVE TO GET THE KEY BACK, YOU HAVE  
7 TO GET THE VOUCHER BACK, YOU HAVE TO GET THE E-LICENSE BACK.  
8 THE WAY IT WORKS IN THE ADOBE PRODUCTS, THAT WOULDN'T BE  
9 ENOUGH UNDER HIS READING OF THE CLAIM. THAT'S NOT ENOUGH FOR  
10 THE GRANTING OR DENIAL OF ACCESS.

11 THEIR INFRINGEMENT THEORY AND THEIR INVALIDITY THEORY ARE  
12 DIRECTLY IN CONFLICT WITH EACH OTHER.

13 SO THE FINAL THING THAT I WOULD ASK YOU TO THINK ABOUT  
14 WHEN IT COMES TO THIS OBVIOUSNESS FOR THIS, AND THIS IS EVEN  
15 IF YOU FIND THAT ADOBE DOESN'T INFRINGE THE '670 PATENT, WHICH  
16 I THINK THE EVIDENCE WILL COMPEL YOU TO DO, EVEN THEN, BECAUSE  
17 IT'S IMPORTANT, CONSIDER THE OBVIOUSNESS OF THE '670 PATENT  
18 OVER SCHULL AND OVER GRISWOLD AND ALL THE TESTIMONY YOU HEARD  
19 YESTERDAY, AND THEN CONSIDER THAT DR. KELLER NEVER DISPUTED  
20 THAT THOSE TWO REFERENCES WOULD BE COMBINED OR COULD BE  
21 COMBINED.

22 HE DIDN'T EXPLAIN WHY THAT WOULDN'T BE A REASONABLE  
23 COMBINATION. AND HE NEVER DISPUTED THAT IT WOULD HAVE BEEN  
24 WITHIN THE SKILL OF A PERSON OF ORDINARY SKILL IN THE ART TO  
25 TAKE SCHULL AND TAKE GRISWOLD AND COME UP WITH EXACTLY THE

1       THING THAT THEY NOW CLAIM IS COVERED BY THE PATENT.   CONSIDER  
2       WHAT YOU HEARD FROM DR. WICKER AND WHAT YOU DIDN'T HEAR FROM  
3       DR. KELLER.

4       THOSE ARE THE FIRST TWO QUESTIONS.   AT THIS POINT I'M  
5       GOING TO TURN IT OVER TO MR. REINES, AND I'M GOING TO ASK YOU,  
6       AFTER YOU CONSIDER THOSE TWO QUESTIONS, TO CONSIDER THE NEXT  
7       THREE.

8                       (PAUSE IN THE PROCEEDINGS.)

9                       **CLOSING ARGUMENT**

10       **MR. REINES:**   GOOD MORNING.

11       IN PURSUING THE JOB THAT YOU HAVE RIGHT NOW, I THINK  
12       THERE'S THREE TOOLS TO USE:   LOGIC, EVIDENCE, AND CREDIBILITY.

13       LET ME START WITH EVIDENCE ON THE QUESTION OF WHAT THEY  
14       KNEW AND WHEN THEY KNEW IT.   THAT WAS THE POSED QUESTION, AND  
15       I'M GOING TO ADDRESS IT WITH REFERENCE TO HARD EVIDENCE.

16       THE STATEMENT IN OPENING STATEMENT, AND WE HEARD THE REDUX  
17       ON CLOSE WAS THAT ADOBE HAS STOLEN PROPERTY, AND THAT THE  
18       TIMING OF WHAT PEOPLE KNEW AND WHEN THEY KNEW IT IS VERY  
19       IMPORTANT.

20       LET'S LOOK AT THAT.   YOU WILL REMEMBER THIS TIME LINE THAT  
21       WAS PRESENTED BY DIG REG.   LET'S HONE IN ON THE THREE MEETINGS  
22       THAT SUPPOSEDLY HAPPENED.   YOU WERE PROMISED IN OPENING  
23       STATEMENT THAT YOU WOULD HEAR ABOUT THREE MEETINGS THAT  
24       HAPPENED.   2004, 2008 AND 2010.

25       THIS WAS WHAT WAS SAID.   "THEY HAD A MEETING WITH A GROUP

1 IN JUNE OF 2004." THAT'S WHAT YOU HEARD.

2 MULTIPLE PROBLEMS. IT WAS A PHONE CALL, SUPPOSEDLY.

3 IN TERMS OF WHO THEY MET WITH, NOTWITHSTANDING THE  
4 EMPHASIZE THAT WAS PLACED ON THIS, MR. VENTERS SAYS, NO ONE  
5 EVER ASKED ME WHO I MET WITH. THERE'S NEVER BEEN ANY  
6 IDENTIFICATION OF ANYONE AT ADOBE VENTURES WHO WAS MET WITH  
7 FROM ANYBODY. HOW CAN WE DEFEND OURSELVES IF THERE'S NO  
8 STATEMENT OF WHO WE SUPPOSEDLY MET WITH? IT JUST DOESN'T PASS  
9 THE SMELL TEST IF THIS IS AS CRITICAL AS IT WAS STATED.

10 AND THE DATE. THEIR ARGUMENT IS JUNE 2004. YOU KNOW WHAT  
11 THE COURT SAID? NOT IN JUNE. SO THEY DON'T KNOW WHAT THE  
12 DATE IS, THEY DON'T KNOW WHO THE PEOPLE WERE. AND YOU CAN  
13 CALL IT A MEETING, BUT IT WAS A PHONE CALL, AT MOST.

14 THEN DURING THE MEETING, WHAT WAS SUPPOSEDLY SENT WAS A  
15 PAPER CALLED THE ADOBE VALUE PROPOSITION.

16 AND MR. VENTERS ON DIRECT EXAMINATION, CONFIDENT, PLAY IT  
17 STRAIGHT UP TO YOU, SAID EXHIBIT 125C, HE KNOWS THERE'S DOZENS  
18 OF VERSIONS OF THIS, 125C, THIS IS THE PAPER WE SENT, AND THEN  
19 HE WENT THROUGH IT LIKE IT WAS A SCRIPT.

20 HE REMEMBERED TEN YEARS AGO, AND HE SAID IN ONE PHONE CALL  
21 AMONG ALL THE COMPANIES HE TALKED TO, AND HE SAID THIS IS WHAT  
22 I SAID, AND HE WENT DOWN IT.

23 ONE OF THE THINGS HE TOLD YOU IS IT HAD THE NUMBER OF THE  
24 '670 PATENT IN IT. YOU LOOK AT THE EXHIBIT THAT'S ULTIMATELY  
25 PUT IN THERE, AND YOU TELL ME WHETHER YOU SEE THE '670 PATENT

1 NUMBER IN THERE.

2 BUT ON DIRECT EXAMINATION, HE THEN REVERSED AND SAYS, NO,  
3 ACTUALLY, 125C IS NOT THE DOCUMENT. THE COURT HAD TO STEP IN  
4 ON THIS IN INSTRUCTIONS AND SAY, DIFFERENT DRAFTS OF THE  
5 DOCUMENT EXIST, AND WHILE HE STATES A VERSION WAS SENT, HE  
6 CANNOT IDENTIFY THE PARTICULAR VERSION.

7 EVEN AFTER HE TESTIFIED. HE DIDN'T KNOW WHAT DOCUMENT HE  
8 SENT. LET'S BE HONEST. SHIFTING STORY AND ABSOLUTELY NO  
9 CORROBORATION.

10 THEY DIDN'T GET MR. FARLEY TO SAY THAT HE HEARD THIS CALL.  
11 HE DIDN'T PARTICIPATE. MR. PATTERSON DIDN'T PARTICIPATE.

12 2008, THE REPRESENTATION FROM DIG REG'S COUNSEL AFTER  
13 PREPARING FOR TRIAL SAYS THERE'S A 2008 MEETING. NO EVIDENCE  
14 AT ALL.

15 YOU CAN'T CONCLUDE THERE'S A 2008 MEETING IF THERE'S NO  
16 EVIDENCE. COUNSEL PROMISED YOU THAT IT WOULD COME. IT DIDN'T  
17 COME.

18 2010. THIS IS FROM THEIR OPENING PROMISE TO YOU. APRIL  
19 OF 2010. STUDY THAT EVIDENCE WHEN YOU GO BACK. REMEMBER YOUR  
20 NOTES. NOTHING. THEY PROMISED YOU THREE MEETINGS WOULD  
21 HAPPEN, TWO DEFINITELY DIDN'T, AT LEAST ACCORDING TO THE  
22 EVIDENCE, AND ONE IS SKETCHY, AT BEST.

23 ALL RIGHT. LET'S LOOK AT THE TIME LINE FURTHER.

24 WHAT DID DIGITAL REG KNOW, OKAY? INSTEAD OF POINTING THE  
25 FIGURE, WHAT DID THEY KNOW? MR. VENTERS TESTIFIED IN 2002 TO

1 2004 HE KNEW ADOBE WAS INFRINGING. NOT MUCH EQUIVOCATION  
2 THERE. GENUINELY BELIEVED.

3 ALL RIGHT. NO NOTICE OF INFRINGEMENT, NO LAWSUIT, NOT CAN  
4 WE RESOLVE THIS, NOT I THINK YOU'RE INFRINGING, LET'S TALK  
5 ABOUT IT.

6 WELL, HE SAYS IN 2004, HE HAD THIS PHONE CALL. HE  
7 MENTIONED ADOBE VALUE PROPOSITION. THIS DOCUMENT WENT, AMONG  
8 OTHERS, TO DOLBY. AT LEAST DOLBY GOT THE COURTESY OF  
9 INFORMATION, WELL, WE THINK YOU MIGHT BE VIOLATING IF HE EVEN  
10 SENT IT OUT.

11 BY THE WAY, ONE OTHER THING ABOUT THE ADOBE VALUE  
12 PROPOSITION THAT MR. VENTERS WAS SURE HE SENT THAT THEN TURNED  
13 OUT HE DIDN'T KNOW WHICH VERSION, IT HAD A COMMENT BUBBLE ON  
14 IT THAT SAID, WE CAN'T FIGURE OUT -- THERE'S A TOUGH STRATEGY  
15 NUT TO CRACK.

16 WHO SENDS TO A MAJOR COMPANY WHEN THEY ARE APPROACHING  
17 THEM A DOCUMENT WITH A COMMENT BUBBLE ON IT AND NO EXPLANATION  
18 OF HOW THEY SOLVED THEIR STRATEGY CHALLENGE.

19 BUT IN ANY EVENT, IN THAT MEETING, IF IT HAPPENED, THIS  
20 PHONE CALL -- NOW I'M CALLING IT A MEETING -- IN THIS PHONE  
21 CALL THEY ARE NOT EVEN SAYING THEY GAVE US THE COURTESY OF  
22 SAYING WE THINK YOU MIGHT BE INFRINGING, WE THINK YOU'LL AVOID  
23 INFRINGEMENT, NOTHING. NO OTHER MEETINGS HAPPENED.

24 BUT WHAT THEY DID DO IS IN 2007, AFTER RETAINING  
25 THINKFIRE, THEY RETAINED A COMPANY WHOSE SPECIALTY WAS USING



1 THE INFORMATION IN THE MARKETPLACE AND DETERMINING WHO'S  
2 INFRINGING. THINKFIRE. AND THEY GOT A LONG LIST IN THIS  
3 TEXAS LITIGATION IN 2007.

4 NOW, I THOUGHT IT WAS SOMEWHAT BIZARRE BECAUSE WHEN THEY  
5 WANTED TO JUSTIFY THE LOW LICENSES AND ALL THE SETTLEMENTS,  
6 FIVE FIGURES, 50,000, 40,000 THEY ENDED UP SAYING, WELL, THOSE  
7 WERE MISFIRES. THEY WERE BARELY INFRINGING AT ALL. WE MADE A  
8 BIG MISTAKE.

9 SO, THEY SUED ALL THESE COMPANIES, AND BIG ONES,  
10 MICROSOFT, MACROVISION, AND THEY MISFIRED? BUT THEY DIDN'T  
11 THINK TO SUE ADOBE WHO THEY KNEW WAS INFRINGING SUPPOSEDLY  
12 FROM 2002 TO 2004?

13 AND THEN MR. VENTERS ADMITTED, PRIOR TO 2011, HE NEVER  
14 INFORMED ADOBE THAT IT WAS INFRINGING THE PATENTS-IN-SUIT. NO  
15 ONE EVER SAID, WE THINK YOU ARE INFRINGING, WE THINK YOU HAVE  
16 A PROBLEM, LET'S WORK IT OUT LIKE NORMAL BUSINESS PEOPLE  
17 WOULD. ALMOST TEN YEARS OF LYING IN WAIT?

18 NO NOTICE, NO LAWSUIT, NO LAWSUIT. WE DON'T NEED A  
19 LAWSUIT TO PAY ATTENTION. WE NEED THE COURTESY OF A  
20 COMMUNICATION THAT SAYS LET'S TALK ABOUT THIS LIKE RESPONSIBLE  
21 BUSINESS PEOPLE. AND ADOBE DOESN'T THAT EVERY DAY.

22 NOW, JONATHAN HERBACH, WHO CAME UP, AND TALK ABOUT CAST  
23 ASPERSIONS. THEY SAID THEY WERE GOING TO FORCE HIM TO TESTIFY  
24 AND CONFIRM THAT HE INTENTIONALLY DESIGNED LIVECYCLE WITH FULL  
25 KNOWLEDGE OF THE DIGITAL REG'S PATENTS. THERE IT IS IN BLACK

1 AND WHITE. YOU LEVEL THAT KIND OF ALLEGATION ABOUT A  
2 PROFESSIONAL?

3 WHAT DID MR. HERBACH SAY? AND DID YOU BELIEVE MR. HERBACH  
4 WHEN HE TESTIFIED ABOUT HOW HE CAME OUT, HE WORKED -- WORKED  
5 THROUGH COLLEGE FOR ADOBE, CAME OUT AND WORKED IN THE R&D  
6 CENTER. BY LATE 2000 SUMMER, HE HAD A COMPLETE WORKING  
7 PROTOTYPE BEFORE THIS SUPPOSED PHONE CALL SOMETIME, THEY DON'T  
8 KNOW.

9 HE DID HIS WORK ON HIS OWN. I ASKED HIM, HAVE YOU EVER  
10 HEARD OF ANYONE GATHERING INFORMATION FROM ADOBE VENTURES AND  
11 BRINGING IT OVER?

12 NO, I NEVER -- WE NEVER DO THAT.

13 HAD YOU EVER READ THE DIG REG PATENTS? REMEMBER THE  
14 PROMISE? WHO COULD HAVE FORCED THIS MAN TO TESTIFY THAT HE  
15 READ THE PATENTS AND USED THEM IN HIS DESIGN.

16 THAT'S WHAT HE SAID. I SHOWED IT TO YOU IN BLACK AND  
17 WHITE.

18 MR. HERBACH, I THINK -- I THOUGHT HE HANDLED IT -- I KNOW  
19 HE HANDLED IT BETTER THAN I WOULD, AS YOU CAN TELL.

20 HE SAID, NO, I'M PRETTY CONFIDENT WE CAN INNOVATE ON OUR  
21 OWN. WE DON'T NEED MR. PATTERSON.

22 AND THEN I SAID, DO YOU KNOW WHAT KIND OF ALLEGATIONS THEY  
23 ARE LEVELING? AND HE SAID, I'M TOTALLY SURPRISED AND  
24 SPEECHLESS. LIKE A PROFESSIONAL ANSWER.

25 I DIDN'T KNOW WHAT HE WAS GOING TO SAY BECAUSE I NEVER

1 ASKED HIM THAT BEFORE.

2 AND THEN MR. VENTERS SAID, NAH, WE CAN'T SAY THEY COPIED  
3 ANYTHING.

4 ALL RIGHT. NOW LET'S TALK ABOUT THE PATENTS, THE PATENT  
5 FILINGS. THE SUGGESTION WAS THAT ADOBE IS SOMEHOW GETTING ALL  
6 THIS INFORMATION FROM DIG REG AND THEN USING IT FOR ITS PATENT  
7 FILINGS, RIGHT?

8 MR. HERBACH, WITHOUT IMPEACHMENT OF ANY KIND, SAID I FILED  
9 ON HALLOWEEN 2003 A WHOLE SET OF PATENTS COVERING LIVECYCLE.  
10 NEVER CHALLENGED. THAT'S 2003 BEFORE ALL THESE OTHER EVENTS  
11 THAT SUPPOSEDLY HAPPENED.

12 NOW, THEY CITE THE '384 PATENT AS ANOTHER EXAMPLE. LOOK,  
13 PATTERSON WAS CITED. THIS WAS FILED, A DRM PATENT, IN JUNE OF  
14 2000. SO, BEFORE THEY EVEN BOUGHT THE PATENT BACK OUT OF  
15 BANKRUPTCY -- ACTUALLY BEFORE ANY OF THE PATENTS ISSUED. SO  
16 IT WASN'T EVEN AVAILABLE INFORMATION. MR. HERBACH COULDN'T  
17 HAVE TAKEN THE INFORMATION, IT WASN'T EVEN AVAILABLE. SO WE  
18 SEE ALL THESE THINGS THAT HAPPENED EVEN BEFORE.

19 HERE'S ANOTHER PATENT. IT CITES PATTERSON, BUT WHAT YOU  
20 HAVE TO ASK YOURSELVES IS WHAT'S THE WHOLE POINT OF THIS  
21 ANYWAY? THAT'S WHAT WE ASK OURSELVES.

22 ALL OF THESE ADOBE PATENTS ISSUED. THE PATENT OFFICE  
23 SAID, WE'RE DIFFERENT. NOW, WHAT THEY WANT TO SAY IS THAT  
24 ADOBE IS THE LITTLE ERASER AT THE TOP OF THE PENCIL AND THAT  
25 THE DIG REG'S TEAM CAME UP WITH HOW TO INVENT THE PENCIL IN

1 THE FIRST PLACE.

2 HAVE YOU SEEN ANY EVIDENCE OF THAT? HAVE YOU SEEN ANY  
3 EVIDENCE THAT THESE ADOBE ARE BELLS AND WHISTLES BUILT ON TOP  
4 OF WHAT DIG REG'S PATENTS COVER? NO, YOU HAVE NOT SEEN A  
5 MORSEL OF THAT.

6 AND THESE CITATIONS OF PATTERSON, THE MORE PATTERSON WAS  
7 CITED, AMONG THE HUNDREDS OF CITATIONS PER PATENT, HUNDREDS.  
8 THE MORE HE WAS CITED, THE MORE THAT SHOWS WE ARE DIFFERENT.  
9 WE ARE INNOVATIVE. I JUST DON'T KNOW WHAT ANY KIND OF  
10 REASONABLE INFERENCE THEY CAN OBTAIN FROM THAT HISTORY.

11 SO WE WERE FIRST RELATIVE TO KNOWING ANY OF THEIR  
12 INFORMATION AND THAT ALL OUR PATENTS ISSUED. THEY DIDN'T SHOW  
13 YOU ONE PATENT THAT GOT -- WHERE THEY SAID, NO, YOU ARE TOO  
14 CLOSE TO PATTERSON.

15 LET'S TALK ABOUT CREDIBILITY, ALL RIGHT? THAT'S WHAT YOU  
16 ARE SUPPOSED TO JUDGE.

17 HERE'S THE CAST OF CHARACTERS THAT WE HEARD OVER THE LAST  
18 COUPLE OF WEEKS. LOOK AT THE PEOPLE ON THE LEFT AND LOOK AT  
19 THE PEOPLE ON THE RIGHT. OKAY? THIS IS FOR YOU TO MAKE THE  
20 DECISION.

21 I AM GOING TO PROVIDE MY VIEWS AND EVIDENCE, BUT IT'S YOUR  
22 DECISION AND I WANT YOU TO THINK ABOUT THOSE WITNESSES AND HOW  
23 THEY APPEARED. AND THE COURT WILL GIVE YOU A WONDERFUL SET OF  
24 TOOLS, ONE THROUGH SEVEN.

25 IT'S THE ONE THAT I CALL OUT AS IMPEACHMENT, DIFFERENT

1 TESTIMONY ON A PRIOR OCCASION. HOW MANY TIMES DID THEY GET  
2 IMPEACHED? AND THE THING YOU NOTICE, COUNSEL CAN STEP UP,  
3 THEY DID IT ONCE OR TWICE AND SAID, I DON'T THINK IT'S  
4 INCONSISTENT TESTIMONY.

5 THEY SWORE ONE THING AT ONE TIME AND CHANGED THEIR  
6 TESTIMONY AND SWORE DIFFERENTLY ANOTHER TIME. I DON'T THINK  
7 THAT HAPPENED AND PREVENT IMPEACHMENT. DOZENS AND DOZENS OF  
8 TIMES THEY WERE IMPEACHED WITH THEIR INCONSISTENT STATEMENTS.

9 THESE CONFLICTING POSITIONS JUST PERMEATE THEIR CASE.

10 RUNNING ROYALTY. YOU REMEMBER MR. PARR. HE SAID THE  
11 PARTIES WOULD AGREE TO A RUNNING ROYALTY, NOT A LUMP SUM.

12 SUPPOSEDLY HE WAS GETTING ALL HIS INFORMATION FROM  
13 MR. FARLEY. THAT'S WHAT HE TELLS YOU. I DON'T REALLY KNOW  
14 THAT MUCH, I JUST GO TO MR. FARLEY AND HE TELLS ME.

15 MR. FARLEY SAYS, NORMALLY YOU DON'T GET A RUNNING ROYALTY  
16 AND THEN HE SAID, I DOUBT WE WOULD HAVE GOTTEN IT BECAUSE I  
17 HAD TO GO TO ADOBE AND I KNOW ADOBE DOESN'T LIKE THAT KIND OF  
18 THING BECAUSE COMPANIES LIKE ADOBE IN THIS SPACE DON'T LIKE  
19 IT.

20 WHAT IS THE BASIS FOR THERE TO BE A RUNNING ROYALTY? AND  
21 THEIR OWN WITNESSES ARE IN CONFLICT.

22 NOW, THE PROBLEM WITH THAT ISN'T JUST THE INCONSISTENCY,  
23 IT'S THIS FALSE PREMISE MR. PARR RUNNING IN THE WRONG  
24 DIRECTION. BECAUSE THEN HE USED THIS FACT OF LOOKING AT  
25 RUNNING ROYALTIES COMPARED TO A LUMP SUM TO EXCLUDE ALMOST ALL

1 THE EVIDENCE IN THE CASE, AND CHERRY PICK THREE THINGS.

2 HE SAID ALL THE OTHER EVIDENCE I'M NOT GOING TO USE FOR MY  
3 ROYALTY BECAUSE I'M COMMITTED TO THIS RUNNING ROYALTY. SO HE  
4 JUST -- AT THIS POINT HE JUST RAN OFF IN THE WRONG DIRECTION.

5 LET'S LOOK AT WHERE THAT DIRECTION LED HIM ASTRAY. FIRST  
6 MACROVISION. YOU REMEMBER THAT DISCUSSION. THAT WAS  
7 1 PERCENT. MR. PARR. LET'S LOOK AT HIS PRIME INFORMATION  
8 SOURCE, MR. FARLEY.

9 HE SAID, I HAVE NO IDEA ABOUT THIS 1 PERCENT FROM  
10 MACROVISION WHEN I SIGNED THAT AGREEMENT. THAT WAS JUST  
11 LAWYER STUFF. THE LAWYERS WANT TO PUT A NUMBER IN, SO IF WE  
12 ARE IN NEGOTIATION OR SOMETHING, WE'VE GOT SOMETHING WE CAN  
13 ARGUE, OR WHATEVER. I ASSUME THAT'S THE BASIS.

14 ALL HE CARED ABOUT WAS GETTING HIS 89,000 BUCKS. THAT IS  
15 WHAT HE CARED ABOUT. THAT'S WHAT HE SAID.

16 SO THIS IDEA THAT MR. PARR'S RELYING ON 1 PERCENT WHEN THE  
17 PERSON THAT NEGOTIATED THE AGREEMENT AND SIGNED IT SAID THAT  
18 WAS IRRELEVANT, TELLS YOU ABOUT THE TYPE OF EVIDENCE THEY ARE  
19 RELYING ON.

20 LET'S LOOK AT INTUIT. AGAIN, MR. PARR WENT TO HIS SOURCE  
21 AND SAID, I GOT THE REVENUE NUMBER FROM MY DISCUSSION WITH  
22 MIKE FARLEY. BEFORE I EVEN MOVED TO THE OTHER SIDE OF THE  
23 SCREEN, THE COURT SAID, WELL, THAT'S NOT SUBSTANTIVE EVIDENCE.

24 HERE IS WHERE THE COMMON SENSE AND LOGIC COMES IN. IF  
25 MR. FARLEY CAN'T TESTIFY UNDER OATH IN COURT ABOUT WHAT SOME

1 OTHER COMPANY'S REVENUE IS, BECAUSE HE DOESN'T REALLY KNOW,  
2 WHY IN THE WORLD WOULD WE LET THAT COME IN AS EVIDENCE BY HIM  
3 HAVING AN UNRECORDED CONVERSATION SOMETIME AGO WITH SOMEONE  
4 ELSE WHERE YOU, THE JURY, CAN'T SEE IT AND WE CAN'T  
5 CROSS-EXAMINE IT. WHY WOULD THAT EVER BE PERMITTED? NOT  
6 SUBSTANTIVE EVIDENCE.

7 MR. FARLEY WAS ASKED: DO YOU HAVE ANY KNOWLEDGE OF WHAT  
8 INTUIT'S REVENUES WERE? NOW, I DON'T BLAME MR. FARLEY. HOW  
9 IS HE SUPPOSED TO KNOW WHAT INTUIT'S REVENUES ARE?

10 HIS ANSWER WAS, NO, HE COULDN'T TESTIFY TO A RATE. SO  
11 THERE'S ABSOLUTELY NO BASIS FOR THAT CALCULATED RATE OF  
12 2.5 PERCENT, JUST AS A SYLLOGISTIC LOGIC. AND I KNOW THE  
13 CALIBER OF THIS JURY, AND I KNOW YOU CAN FOLLOW THAT. IT'S  
14 NOT THAT HARD.

15 NOW WE HAVE THIS ISSUE OF THE ADOBE PLUG-IN. SO THEY WANT  
16 NO RELY ON THE ADOBE PLUG-IN. I MEAN, I JUST -- THE WORK  
17 PRODUCT THAT SOMEONE WOULD COME, COME IN THIS COURTROOM AFTER  
18 SPENDING HUNDREDS OF HOURS IN THE 70 CASES AND SAY, I'M  
19 RELYING ON SOMETHING I NEVER SAW IT EVER LICENSED, IT'S NOT  
20 ABOUT PATENTS, IT'S NOT ABOUT DRM BECAUSE YOU DON'T GET DRM  
21 FOR THE 5.5 PERCENT, AND I'M GOING TO TELL YOU IT WAS A  
22 NOVEMBER 4TH, 2013 AGREEMENT.

23 IS THAT THE KIND OF WORK PRODUCT YOU WANT TO RELY ON WHEN  
24 YOU ARE DOING YOUR JOB WITH THE SERIOUSNESS THAT YOU ARE  
25 TAKING THIS PROJECT?

1 BUT INSTEAD OF LOOKING AT THIS BODY OF EVIDENCE THAT HE  
2 HAS OF LICENSES OF THE PATENTS-IN-SUIT THEMSELVES, HE GOES OFF  
3 AND LOOKS AT THIS NONPATENT, NONDRM AGREEMENT.

4 AND LOOK AT THOSE NUMBERS. I THOUGHT MR. PROWSE DID A  
5 WONDERFUL JOB OF EXPLAINING TO YOU WHY THE VALUE WAS LOW. HE  
6 JUST SAID, I'VE DONE A LOT OF THESE CASES; THESE NUMBERS ARE  
7 LOW. AND THEY ARE. ESPECIALLY FOR SOMEONE THAT'S SEEKING  
8 15 MILLION FOR ONLY A DOMESTIC LICENSE, FOR ONLY SELECT  
9 PRODUCTS, FOR ONLY TWO PATENTS, NOT THE WHOLE PORTFOLIO, AND,  
10 BY THE WAY, WE CAN SUE YOU TOMORROW. AND THAT'S THE  
11 IMPORTANCE OF THE VALIDITY QUESTION.

12 THIS IS WHAT HE LOOKED AT, BECAUSE HE WENT RUNNING OFF IN  
13 THE WRONG DIRECTION TO THE REASONABLE ROYALTY. NOW, THE  
14 ANSWER MAY BE HE WENT RUNNING IN THAT DIRECTION BECAUSE HE  
15 WANTED A DESTINATION SO HE HAD TO RUN IN THAT DIRECTION, AND  
16 THAT'S WHY HE MADE THE ASSUMPTION OF REASONABLE ROYALTY WHEN  
17 FARLEY WAS SO SURE THAT IT WOULD HAVE BEEN A LUMP SUM.

18 LET'S TALK ABOUT DESIGN AROUND.

19 MR. PARR SAID I RELIED ON DR. DEVANBU. YOU REMEMBER HE  
20 RELIED ON PEOPLE FREQUENTLY WHEN THERE WAS TOUGH QUESTIONS.

21 AND HE SAYS DEVANBU TOLD HIM IN AN UNRECORDED  
22 CONVERSATION, YOU'VE NEVER HEARD ANYTHING ABOUT, YOU HAVEN'T  
23 SEEN NOTES ABOUT IT, WHY THESE THING HAPPEN OUTSIDE YOUR  
24 PRESENCE, OUR PRESENCE, AND THEN GET RELIED ON FOR SOMETHING  
25 THAT MR. PARR HAS TO ANSWER. BUT HE SAID, HE DIDN'T CONSIDER



1 DR. WICKER'S TESTIMONY ABOUT THE DESIGN AROUNDS.

2 IN FRONT OF US IN THE LAST TWO WEEKS, DR. DEVANBU TOOK A  
3 PASS. I HAVEN'T FORMED AN OPINION ON THE CHOICES AVAILABLE TO  
4 ADOBE. HE NEVER COMMENTED ON ALL OF THE SPECIFIC ALTERNATIVES  
5 DR. WICKER SAID, AND SAID THAT DOESN'T MAKE SENSE, THAT WOULD  
6 BE HARD, THAT'S EXPENSIVE, PEOPLE WOULDN'T LIKE THE PASSWORD  
7 HERE OR THE SUBMISSION THERE.

8 NOW, IN SOME WAYS, I THINK THIS IS THE MOST OFFENSIVE  
9 PIECE OF THE PUZZLE, WHICH IS THE ATTEMPT TO CAPTURE ALL OF  
10 THE ACROBAT PRO REVENUE AND A WHOLE BUNCH OF OTHER REVENUE  
11 THAT DOESN'T BELONG IN THIS CASE TO THE LIVECYCLE.

12 AND THE COURT, IT'S IN THE INSTRUCTIONS, SAYS METHOD  
13 CLAIMS ARE ONLY INFRINGED WHEN THE PROCESS IS PERFORMED, NOT  
14 BY THE SALE OF AN APPARATUS -- PATENT SPEAK FOR A THING AS  
15 COMPARED TO AN ACTION -- THAT IS CAPABLE OF INFRINGING USE.

16 SO THE SALE OF THE PRODUCT ISN'T THE INFRINGEMENT, WHETHER  
17 IT BE LIVECYCLE OR ANYTHING ELSE, IT'S THE ACTUAL USE OF THE  
18 DRM PROCESS.

19 EVEN MORE IMPORTANT AND CENTRAL, AND, AGAIN, WE -- FOR ALL  
20 OF THE PERSUASIVE REASONS THAT I AM SO PROUD OF MY PARTNER,  
21 SONAL MEHTA, SHE PRESENTED, THERE'S NO WAY WE SHOULD BE  
22 HEADING TO DAMAGES IF YOU HEARD THE SAME PRESENTATIONS I HEARD  
23 AND THE COMPARISON AND THE FOCUS OF THE EVIDENCE.

24 BUT ASSUMING THAT YOU DO, AND FOCUSING ON THE CREDIBILITY  
25 OF THE POINT, THAT'S WHERE I THINK IT'S ACTUALLY RELEVANT AND

1 ENLIGHTENING, IF A PARTICULAR PRODUCT SOLD BY ADOBE IS NEVER  
2 ENABLED TO BE USED, AN INFRINGING MANAGER, THERE IS NO  
3 INFRINGEMENT AND SUCH UNITS OF PRODUCTS ARE NOT IN THE ROYALTY  
4 BASE.

5 MR. PARR: OH, I JUST ASSUMED EVERYTHING WAS IN THE  
6 ROYALTY BASE.

7 IT'S PRETTY GLIB. IT'S PRETTY GLIB FOR SOMEONE THAT PUTS  
8 \$2 BILLION UP ON THE SCREEN AND THE NOTE HE TOOK ALL OF THE  
9 ACROBAT PROFESSIONAL, EVERY SINGLE COPY THAT WAS SOLD IS ON  
10 HIS CHART.

11 AND THE QUESTION WAS, DO YOU KNOW WHO ACTUALLY USED IT  
12 WITH LIVECYCLE RIGHTS MANAGEMENT, WHICH YOU NEED TO DO TO  
13 INFRINGE, YOU NEVER HEARD ANYBODY SAY THERE WAS ANY OTHER WAY?

14 NO.

15 I SAID: WILL YOU ACKNOWLEDGE THAT IF YOU DON'T USE THE  
16 METHOD OF DRM, YOU ARE NOT INFRINGING EVEN IF THERE IS LATENT  
17 CAPABILITY?

18 HE SAID: YEAH, THAT'S RIGHT.

19 THAT IS THE TRIAL TRANSCRIPT CITE 1052.

20 AND HIS ASSUMPTION WAS HE DIDN'T CARE IF THE PRODUCT WAS  
21 EVER USED WITH DRM. HE FLAT IGNORING THE COURT'S INSTRUCTIONS  
22 TO YOU. AS LONG AS IT WAS SOLVED, IT'S AN APPARATUS,  
23 \$2 BILLION BASE.

24 THEN ASKED: WELL, WHAT INFRINGEMENT THEORY WOULD POSSIBLY  
25 JUSTIFY INCLUDING ACROBAT PRO WHEN IT NEVER USES LIVECYCLE?

1 OTHERS HAVE TO PROVE THAT.

2 DR. DEVANBU DIDN'T PROVE THAT. HE SAID: WITH LIVECYCLE  
3 RIGHTS MANAGEMENT ENABLED. THAT WAS HIS OWN ANSWER.

4 YOU SAW THE JURY INSTRUCTION THAT YOU'RE GOING TO GET THAT  
5 SAYS IT HAS TO BE ENABLED IN ORDER FOR IT TO EVEN BE ELIGIBLE.  
6 AND ALL HE SAID IS: THE INFRINGING IS LIVECYCLE RIGHTS  
7 MANAGEMENT ENABLED.

8 AND THEN WE ASKED HIM THE \$15 MILLION-DOLLAR QUESTION: IN  
9 TERMS OF THIS \$2 BILLION REVENUE BASE, DO YOU HAVE ANY IDEA  
10 WHAT PORTION OF THOSE USERS MIGHT USE LIVECYCLE RIGHTS  
11 MANAGEMENT?

12 NO. SOMEONE ELSE IS GOING TO TELL HIM SOMEWHERE. MAYBE  
13 MR. FARLEY.

14 BUT WHEN HE WE PUT UP WITNESSES, THEY ANSWERED THE  
15 QUESTION AS BEST THEY COULD, WHICH IS, THERE'S TENSE OF  
16 MILLIONS OF COPIES OF ADOBE PROFESSIONAL. THERE'S A COUPLE  
17 OF HUNDRED INSTALLATIONS OF LIVECYCLE. TENSE OF MILLIONS,  
18 COUPLE HUNDRED.

19 I'M SURE ADOBE WISHED MORE PEOPLE USED LIVECYCLE. I DON'T  
20 USE IT. I DON'T KNOW IF ANY OF YOU HAVE EVER HEARD OF IT. I  
21 HAVEN'T HEARD OF IT BEFORE THIS CASE. SUPER TINY.

22 SO THEY WANT SUPER TINY TO -- AND THEY'RE ASSUMING THAT  
23 EVERYTHING IS USING IT. THE COURT IS GOING TO TELL YOU THAT'S  
24 TOTALLY INAPPROPRIATE.

25 LIKE I SAID, I DON'T THINK YOU GET TO DAMAGES, BUT WHAT

1 DOES THIS SAY ABOUT CREDIBILITY? THERE'S ALL THESE PRODUCTS  
2 THAT YOU HEARD NOTHING ABOUT. THEY DIDN'T GIVE YOU THE  
3 COURTESY. THEY WANT WHAT IS THAT 150, 2 MILLION FOR LC READER  
4 EXTENSIONS? AND THEY DON'T MENTION IT?

5 JUST BECAUSE THEY PUT IT ON A BIG GRID, DOESN'T MEAN THAT  
6 THEY'RE ENTITLED TO IT. IN FACT, THERE IS NO BASIS FOR THEM  
7 BEING ENTITLED TO IT.

8 WHY ARE WE HERE? WE ARE HERE, I THINK, FROM THE DIG REG  
9 PERSPECTIVE FOR THE REASONS STATED BY MR. FARLEY QUITE  
10 CANDIDLY HERE, IT IS HIS VIEW THAT GREED IS AN EMOTION THAT HE  
11 HAS, AND HE THINKS EVERYONE HAS IT.

12 WE DON'T HAVE TO LIVE IN A WORLD IN A PATENT SYSTEM WHERE  
13 THE CULTURE IS THAT EVERYBODY'S GOT GREED, AND THAT'S OKAY.  
14 AND I AM GOING TO COME IN COURT AND NOT EVEN BE EMBARRASSED,  
15 AND SAY GREED'S THE EMOTION THAT MAYBE CAUSED ME TO PURSUE  
16 THIS BUSINESS DEAL. AND WE ALL HAVE THAT.

17 I THINK THAT'S -- I DON'T WANT TO SPEAK TOO MUCH TO THAT,  
18 BUT THAT'S KIND OF SPEAK FOR YOURSELF.

19 THEN FROM THE ADOBE PERSPECTIVE, WHY NOT JUST PAY 70,000,  
20 80,000, 150, 200, 600, WHATEVER AMOUNT THEY ARE ASKING WHEN  
21 THEY COME IN AND THEY WANT YOU TO -- IT'S GOING TO BE MILLIONS  
22 TO LITIGATE. YOU'VE DONE IT BEFORE. YOU'VE PAID OFF OTHER  
23 PEOPLE.

24 WE DO NOT INFRINGE. I HAVE SEEN A LOT OF CLOSING  
25 ARGUMENTS IN MY DAY, AND THE ONE PUT ON BY MS. MEHTA WHERE SHE

1 WALKED SYSTEMATICALLY THROUGH THE REQUIREMENTS AND THE  
2 EVIDENCE AND DEMONSTRATED BEYOND QUESTION THERE WAS NO  
3 INFRINGEMENT AND, IN FACT, THESE PATENTS ARE INVALID.

4 YES, SOME PEOPLE ARE GOING TO SETTLE, BUT SOME PEOPLE ARE  
5 GOING TO STAND UP. AND THAT IS WHAT ADOBE IS DOING IN THIS  
6 CASE.

7 FAIRNESS DICTATES THAT THE APPEALS TO A SMALL COMPANY, THE  
8 APPEALS TO THE CONSTITUTION, THE APPEALS TO GOING TO AN A'S  
9 GAME WITH A BASEBALL GLOVE INSTEAD OF WATCHING THE GAME HOPING  
10 YOU CATCH A BALL -- THAT'S NOT FAIRNESS. FAIRNESS IS LOOKING  
11 AT THE EVIDENCE, MAKING THE RIGHT DETERMINATION, AND NOT  
12 TREATING ADOBE AS SOMEHOW IMPROPER FOR ITS DAY IN COURT TO SAY  
13 WE'RE TAKING A STAND THIS TIME. AND EVERYONE ELSE CAN PAY,  
14 WE'RE NOT PAYING.

15 THANK YOU VERY MUCH FOR YOUR ATTENTION. YOU HAVE BEEN AN  
16 INCREDIBLY ATTENTIVE JURY. AND I THANK YOU VERY MUCH.

17 **REBUTTAL CLOSING ARGUMENT**

18 **MR. ELLWANGER:** MAY IT PLEASE THE COURT?

19 IT WAS AN AWFUL LONG CLOSING ARGUMENT TO NOT SHOW YOU ANY  
20 ADOBE DOCUMENTS, TO NOT WALK THROUGH THE VERY WORDS THAT ADOBE  
21 PUTS ON PAPER TO TALK ABOUT HOW ITS PRODUCTS WORK.

22 THEY DID TALK A LOT ABOUT THE TESTIMONY. AND I DON'T WANT  
23 TO LEAVE THAT UNREBUTTED BECAUSE THERE ARE SOME PIECES OF THE  
24 TESTIMONY THAT THEY DIDN'T DISCUSS WITH YOU, AND I WANT TO  
25 MAKE SURE YOU HAVE THIS INFORMATION BEFORE YOU GO BACK INTO

1 THAT JURY ROOM.

2 WE ARE GOING TO GO CHRONOLOGICALLY THROUGH A FEW KEY  
3 POINTS FROM THE CLOSING.

4 FIRST OFF, REGARDING THE TOKEN AND FLASH, DR. DEVANBU  
5 TESTIFIED THAT HE DIDN'T CONSIDER THE TERM "YES OR NO".

6 SORRY, I'VE GOT TO GET OLD FASHION HERE, BUT THIS IS FROM  
7 THE SLIDE YOU JUST SAW.

8 THE QUESTION WAS: DOES THAT CONSTRUCTION INCLUDE THE  
9 TERM, THE LANGUAGE "YES OR NO", AND IT DOESN'T. THEY DON'T  
10 USE ENGLISH TERMS LIKE THAT IN COMPUTER CODE.

11 THE COURT HAS INSTRUCTED YOU ABOUT A YES/NO INDICATOR.  
12 AND ONCE AGAIN, SAME HIGHLIGHTING ISSUE CAME UP DURING THAT  
13 CLOSING ARGUMENT.

14 HERE'S ADOBE'S SLIDE. WELL, THEY HIGHLIGHTED THAT FIRST  
15 SENTENCE IN YELLOW AND THEY HIGHLIGHTED THE LAST SENTENCE IN  
16 YELLOW, BUT THEY LEFT OUT THE MIDDLE SENTENCE. THE ONE I  
17 HIGHLIGHTED IN ORANGE. I WANT YOU TO FOCUS ON THIS ONE FOR  
18 JUST A MOMENT.

19 THE COURT INSTRUCTED, I WANTED TO EXPLAIN THAT I  
20 INTERPRETED THE TERM "TOKEN" AS YOU WILL SEE IN YOUR PAPERS TO  
21 MEAN A FILE INDICATING WHETHER THE TRANSACTION HAS BEEN  
22 APPROVED AND ACCESS SHOULD BE GRANTED.

23 SO LET'S LOOK AT THE TESTIMONY. PAGE 494, LINE 16,  
24 DR. DEVANBU WAS ASKED:

25 "OKAY, SIR, BUT AT LEAST AS FAR AS THE TERM "TOKEN"

1           THAT HAS BEEN CONSTRUED BY THE COURT, DID YOU APPLY  
2           OR IS YOUR ANALYSIS CONSISTENT WITH THE COURT'S CLAIM  
3           CONSTRUCTION FOR TOKEN?

4           "ANSWER: YES, IT IS."

5           PAGE 510.

6           "ANSWER: THE EXTERNAL SOURCE PROVIDES A LICENSED  
7           TOKEN WHICH CONTAINS INFORMATION THAT ALLOWS THE  
8           CLIENT TO DECIDE WHETHER OR NOT TO GRANT ACCESS."

9           YOU SEE, ADOBE KEEPS DIRECTING YOUR ATTENTION TO THINGS  
10          GOING ON AT THE SERVER. BUT AS YOU SEE FROM THE CLAIMS, THE  
11          '541 IS FOCUSED ON THE CLIENT.

12          DR. DEVANBU EXPLAINED THAT WHAT IS TRANSMITTED IS USED AS  
13          AN INPUT TO GENERATE THE PERMISSION AT THE CLIENT.

14          THE TOKEN ISN'T THE PERMISSION. THEY MUST BE DIFFERENT.  
15          SO IN THE '541 PATENT AND THE ACCUSED PRODUCTS, THEY ARE.

16          IN LIVECYCLE, THE TOKEN IS AN ENCRYPTED VOUCHER. THE  
17          ENCRYPTED VOUCHER INCLUDES A KEY AND A SERIES OF PERMISSIONS.  
18          IT'S USELESS IF IT'S INTERCEPTED. THAT'S THE WHOLE POINT,  
19          RIGHT? THE KEY AND THE PERMISSIONS, WELL THOSE ARE GENERATED  
20          AT THE CLIENT.

21          DR. WICKER CONCEDED THAT DIGITAL OBJECTS CAN BE  
22          REGENERATED.

23          ON THE FLASH PRODUCT THERE, AS I SAID BEFORE, THE TOKEN IS  
24          A LICENSE FILE. IT HAS AN ENCRYPTED KEY AND PERMISSIONS.  
25          AND, AGAIN, IT'S USELESS IF IT IS INTERCEPTED. IT HAS TO BE

1 PROCESSED AND DECRYPTED BEFORE BEING STORED.

2 AND I MIGHT ADD, THAT STEP ISN'T PRESENT IN THE SCHULL  
3 PATENT.

4 AND, AGAIN, MEMBERS OF THE JURY, I APOLOGIZE, I'M JUST  
5 READING FROM TRANSCRIPT PAGES, BUT I WANT YOU TO CONSIDER THIS  
6 TESTIMONY ALONG WITH WHAT YOU JUST HEARD.

7 DR. WICKER, ADOBE'S EXPERT, ADMITTED ON CROSS-EXAMINATION  
8 THAT THE TOKEN ISN'T THE KEY BUT IT'S THE PERMISSIONS AND IT  
9 CONTAINS THE SET OF PERMISSIONS.

10 AND, FOR EXAMPLE, THE PERMISSIONS INCLUDE THAT YES/NO  
11 INDICATOR AND THAT THE USER COULD, FOR EXAMPLE, ACCESS THE  
12 ABILITY TO PRINT.

13 WE'RE UP TO PAGE 758, LINE 2, OF THE WICKER  
14 CROSS-EXAMINATION BY MR. DINOVO.

15 SO, FOR EXAMPLE, IT WOULD GIVE A YES OR A NO INDICATION AS  
16 TO WHETHER THAT USER COULD PRINT, RIGHT?

17 THAT WOULD BE AN EXAMPLE OF THE RIGHTS, HE ANSWERED. THAT  
18 WOULD BE EITHER ALLOWED OR DISALLOWED. THAT'S CORRECT.

19 PAGE 773, LINE 2. SO THE SET OF PERMISSIONS IS NOT THE  
20 EDC VOUCHER?

21 "ANSWER: THE EDC VOUCHER CONTAINS THE PERMISSIONS.

22 AND PERMISSIONS ORIGINATE AT THE SERVER. THEY ARE  
23 EXTRACTED OR OBTAINED FROM THE OBJECT THAT IS  
24 DECRYPTED AT THE CLIENT."

25 YOU WERE ALSO WALKED THROUGH A DISCUSSION, ONCE AGAIN, OF



1       THESE SCHULL PATENTS -- THE SCHULL PATENT, EXCUSE ME. AND  
2       HOW, BECAUSE OF THAT PATENT, THE '541 AND THE '670 PATENT,  
3       THEY SHOULD JUST BE INVALIDATED. PATRICK PATTERSON'S PATENTS  
4       SHOULD BE TAKEN AWAY.

5       BUT REMEMBER THAT SCHULL GENERATES A PASSWORD AT THE  
6       SERVER. PASSES IT IN THE SAME FORM AND STORES IT IN THE SAME  
7       FORM. PROFESSOR SCHULL, DR. WICKER, AND DR. KELLER ALL AGREED  
8       ABOUT THAT.

9       ADOBE, ON THE OTHER HAND, PASSES AN ENCRYPTED TOKEN,  
10      DECRYPTS AND EXTRACTS THE KEYS AND PERMISSIONS, AND THEN THOSE  
11      DECRYPTED PERMISSIONS ARE STORED. WHAT'S STORED IS NOT WHAT  
12      IS TRANSMITTED BECAUSE THAT MUST BE GENERATED AT THE CLIENT.  
13      DR. DEVANBU AND DR. WICKER AGREED.

14      AND ONE MORE POINT ON DR. SCHULL. HE SEEMED LIKE AN  
15      ABSOLUTELY GREAT MAN. I DON'T HAVE ANY QUIBBLE WITH WHO HE IS  
16      AS A PERSON, BUT HIS PATENT DOESN'T DO EXACTLY WHAT THESE  
17      PATENTS DO.

18      AND, YOU KNOW, HIS COMPANY, IT WENT BANKRUPT AFTER THE  
19      BUBBLE BURST, TOO. HIS COMPANY DOESN'T EXIST ANYMORE EITHER.  
20      BUT IT DOESN'T MEAN, AS HE SAID, THAT HIS TECHNOLOGY WASN'T  
21      SOUND. THE SAME IS TRUE FOR THE '541 AND THE '670 PATENTS.

22      THE FINAL EVIDENTIARY POINT I WANT TO GET TO BEFORE WE  
23      DISCUSS CREDIBILITY IS ABOUT THE TIME LINE AND MR. HERBACH  
24      FILING THESE LIVECYCLE PATENTS. HIS FIRST PATENT ON HALLOWEEN  
25      2003.

1 WELL, THE PROBLEM WITH THAT IS THAT THIS CASE IS ABOUT  
2 LIVECYCLE RIGHTS MANAGEMENT. AND LIVECYCLE RIGHTS MANAGEMENT,  
3 THAT DIDN'T COME AROUND UNTIL 2005. THAT'S WHAT HE TESTIFIED  
4 TO.

5 AND ON DAMAGES, IN ORDER TO THINK ABOUT THESE, AGAIN,  
6 SMALLER SETTLEMENTS THAT THEY PUT OUT, OR THIS HUNDRED  
7 THOUSAND DOLLAR WORK-AROUND THAT YOU HEARD TESTIMONY ABOUT, DO  
8 YOU THINK DIGITAL REG WOULD AGREE TO THAT IF YOU HAD ALREADY  
9 FOUND INFRINGEMENT? IF YOU HAD ALREADY FOUND VALIDITY?

10 ALL THOSE LICENSE AGREEMENTS THAT YOU HEARD ABOUT, THOSE  
11 WERE ALL NEGOTIATED WITHIN THE CONTEXT OF PENDING INFRINGEMENT  
12 CLAIMS, AND PENDING VALIDITY CLAIMS, AND ALL A FIGHT LIKE  
13 THIS. THAT'S NOT THE HYPOTHETICAL NEGOTIATION. THAT OCCURS  
14 AFTER A JURY LIKE YOU WOULD HAVE FOUND INFRINGEMENT AND FOUND  
15 VALIDITY, AND THOSE NUMBERS ARE DIFFERENT.

16 NOW, HE TOLD YOU THAT WE ACCUSED \$2 BILLION WORTH OF  
17 PRODUCT AND DIDN'T REALLY WANT TO TALK ABOUT THE FACT THAT WE  
18 SLICED 70 PERCENT OFF TO FOLLOW THE INDUSTRY STANDARD.

19 AND THE OTHER THING THAT YOU DIDN'T HEAR IS THAT THE  
20 REASON WE ACCUSED \$2 BILLION WORTH OF PRODUCT IS BECAUSE THAT  
21 PRODUCT ALL CONTAINS THE CODE. IT CONTAINS THAT  
22 FUNCTIONALITY. IT INFRINGES.

23 NOW I WANT TO TALK TO YOU -- I FEEL LIKE I OWE YOU --

24 **MR. REINES:** OBJECTION, YOUR HONOR. THE ARGUMENT  
25 THAT WAS JUST MADE IS THAT IT'S IN THE CODE AND THAT IT EXISTS

1 AND IT'S INFRINGING FOR \$2 BILLION WORTH OF PRODUCT. THAT IS  
2 COUNTER FACTUAL AND COUNTER LEGAL.

3 **THE COURT:** WELL, THE INSTRUCTIONS WILL GUIDE THE  
4 JURY IN THEIR CONSIDERATION OF THESE ARGUMENTS.

5 **MR. ELLWANGER:** ADOBE'S LAWYER'S RIGHT. WHEN I WAS  
6 11, I PROBABLY DID FOCUS MORE ON TRYING TO CATCH A BALL THAN  
7 WATCHING THE GAME.

8 BUT ON SEPTEMBER 26TH, 1987, AT THE COLISEUM ON REGGIE  
9 JACKSON DAY, HAROLD BANES HIT A BALL THAT WAS FOULED DOWN THE  
10 RIGHT FIELD LINE AND RATTLED AROUND THE BULL PIN, AND HE  
11 ACTUALLY FLIPPED IT UP INTO THE STANDS. AND I REMEMBER THE  
12 BALL KIND OF BLOCKING OUT THE SUN, THAT AFTERNOON SUN, AND I  
13 WILL NEVER FORGET THE FEEL OF IT HITTING MY GLOVE. AND THE  
14 LOOK ON MY DAD'S FACE WHEN I WALKED BACK TO OUR SEATS AND  
15 SHOWED HIM.

16 AND THE FUNNY THING ABOUT MEMORIES IS, I WILL NEVER FORGET  
17 CATCHING A BASEBALL AT AN A'S GAME AND I WILL NEVER FORGET  
18 THAT FEELING AND I WILL NEVER FORGET WHAT IT LOOKED LIKE GOING  
19 INTO MY GLOVE, BUT TO BE HONEST WITH YOU, I FORGOT THE DATE.

20 I HAD TO LOOK UP IN THE BASEBALL ALMANAC WHEN REGGIE  
21 JACKSON DAY WAS SO I COULD REMEMBER THE DATE. AND I ALSO  
22 HADN'T REMEMBERED THAT THE A'S LOST 4 TO 3, TWO RUNS GIVEN UP  
23 IN THE NINTH BY ERIC CLUNK. I HAD TO REFRESH MY RECOLLECTION  
24 ON THAT ONE. I BET I REMEMBERED IT WHEN I WAS 11.

25 THE POINT IS, YOU CAN REMEMBER REALLY IMPORTANT THINGS IN

1 YOUR LIFE, THINGS THAT YOU CARRY WITH YOU FOR YOUR WHOLE LIFE,  
2 AND IT DOESN'T ALWAYS MEAN THAT YOU REMEMBER THE DATE OR THE  
3 SCORE OR WHO THE LOSING PITCHER WAS. BUT IT DOESN'T CHANGE  
4 THE FACT THAT IT HAPPENED.

5 JURORS ARE INCREDIBLE -- THEY ARE INCREDIBLE PEOPLE AT  
6 JUDGING CHARACTER. JURORS ARE VERY GOOD ABOUT BEING ABLE TO  
7 ASCERTAIN WHAT'S REAL AND WHAT'S NOT.

8 AND WHEN YOU THINK BACK TO THE TESTIMONY OF PATRICK  
9 PATTERSON, AND THOSE NIGHTS WORKING LATE AT FISH & RICHARDSON,  
10 PROVING TO THOSE LAWYERS THEY WERE HELPING WRITE HIS PATENT  
11 WHETHER HIS INVENTION WORKED, I THINK YOU CAN BELIEVE THAT.

12 AND WHEN MR. VENTERS ADMITTEDLY DID TALK ABOUT VERSION  
13 AFTER VERSION, 12 DIFFERENT VERSIONS OF THIS ADOBE VALUE  
14 PROPOSITION THAT HE WORKED ON, HIS TEAM WORKED ON, THIS WAS AN  
15 IMPORTANT CHANCE FOR THEM TO TRY AND LICENSE THEIR TECHNOLOGY,  
16 WHEN THEY KNEW THEY COULDN'T BUILD ON THE SCALE OF ADOBE.  
17 ADOBE'S POSITION IS THAT HE JUST COMPLETELY MADE ALL THAT UP?

18 YOU CAN JUDGE CHARACTER. AND YOU CAN JUDGE TESTIMONY.  
19 YOU CAN LOOK AT THE CODE. YOU CAN LOOK AT THE DOCUMENTS. YOU  
20 CAN LOOK AT THE CLAIMS. WHEN YOU ARE TRYING TO REMEMBER WHAT  
21 ADOBE KNEW AND WHEN ADOBE KNEW IT, DON'T FORGET THIS  
22 TESTIMONY. DON'T FORGET THAT IN ADOBE'S OWN PATENT  
23 APPLICATIONS, YOU HAVE THESE PATENTS DISCLOSED BY THE PATENT  
24 OFFICE. THE '670 AND THE '541.

25 WOULD YOU LOOK AT THAT? THEY EVEN USED OUR LAW FIRM.

1 MEMBERS OF THE JURY, AT THE BEGINNING OF THIS TRIAL I TOLD YOU  
2 THAT DIGITAL REG WOULD PROVE THREE THINGS BECAUSE WE KNEW THAT  
3 THE EVIDENCE WOULD SHOW YOU BY NOW WHAT WE KNEW THEN.

4 FIRST, ADOBE INFRINGES THE '541 AND '670 PATENT, AND THEY  
5 DID SO WILLFULLY.

6 SECOND, PATRICK PATTERSON INVENTED THE '541 AND THE '670  
7 PATENTS JUST LIKE THE U.S. PATENT OFFICE SAID HE DID.

8 AND THIRD, ADOBE OWES ROYALTIES FOR USING THESE INVENTIONS  
9 AND NOT PAYING FOR THEM.

10 WE ASK THAT YOU FOLLOW THE CODE, YOU FOLLOW THE DOCUMENTS,  
11 YOU FOLLOW THE CLAIMS, AND YOU FIND FOR DIGITAL REG.

12 **THE COURT:** ALL RIGHT, LADIES AND GENTLEMEN, IN A  
13 MOMENT I WILL EXCUSE YOU TO BEGIN YOUR DELIBERATIONS. WHEN  
14 YOU DO THAT YOU SHOULD ELECT ONE MEMBER OF THE JURY AS YOUR  
15 FOREPERSON. THAT PERSON WILL RESIDE OVER YOUR DELIBERATIONS  
16 AND SPEAK FOR YOU HERE IN COURT.

17 YOU WILL THEN DISCUSS THE CASE WITH YOUR FELLOW JURORS TO  
18 REACH AGREEMENT, IF YOU CAN DO SO. YOUR VERDICT MUST BE  
19 UNANIMOUS. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF, BUT  
20 YOU SHOULD DO SO ONLY AFTER YOU HAVE CONSIDERED ALL THE  
21 EVIDENCE, DISCUSSED IT FULLY WITH THE OTHER JURORS, AND  
22 LISTENED TO THE VIEWS OF YOUR FELLOW JURORS.

23 DO NOT BE AFRAID TO CHANGE YOUR OPINION IF THE DISCUSSION  
24 PERSUADES YOU THAT YOU SHOULD. BUT DO NOT COME TO A DECISION  
25 SIMPLY BECAUSE THE OTHER JURORS THINK IT IS RIGHT.

1 IT IS IMPORTANT THAT YOU ATTEMPT TO REACH A UNANIMOUS  
2 VERDICT, BUT OF COURSE ONLY IF EACH OF YOU CAN DO SO AFTER  
3 HAVING MADE YOUR OWN CONSCIENTIOUS DECISION. DO NOT CHANGE AN  
4 HONEST BELIEF ABOUT THE WEIGHT AND EFFECT OF THE EVIDENCE  
5 SIMPLY TO REACH A VERDICT.

6 IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO  
7 COMMUNICATE WITH ME, YOU MAY SEND A NOTE THROUGH THE CLERK OR  
8 THROUGH THE MARSHAL WHO WILL BE STATIONED OUTSIDE YOUR DOOR,  
9 SIGNED BY YOUR FOREPERSON OR BY ONE OR MORE MEMBERS OF THE  
10 JURY. NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO  
11 COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING, AND I WILL  
12 RESPOND TO THE JURY CONCERNING THE CASE ONLY IN WRITING OR  
13 HERE IN OPEN COURT.

14 IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE  
15 LAWYERS BEFORE ANSWERING IT, WHICH MAY TAKE SOME TIME. YOU  
16 MAY CONTINUE YOUR DELIBERATIONS WHILE WAITING FOR THE ANSWER  
17 TO ANY QUESTION.

18 REMEMBER THAT YOU ARE NOT TO TELL ANYONE, INCLUDING ME,  
19 HOW THE JURY STANDS NUMERICALLY OR OTHERWISE UNTIL AFTER YOU  
20 HAVE REACHED A UNANIMOUS VERDICT OR HAVE BEEN DISCHARGED. DO  
21 NOT DISCLOSE ANY VOTE COUNT IN ANY NOTE TO ME.

22 A VERDICT FORM HAS BEEN PREPARED FOR YOU AS I READ TO YOU  
23 EARLIER. WE WILL SEND BACK A SCRATCH COPY FOR EACH OF YOU OF  
24 THAT FORM AND THEN THE ORIGINAL THAT YOU WILL BE RETURNING.

25 AFTER YOU'VE REACHED A UNANIMOUS AGREEMENT ON THE VERDICT,

1 YOUR FOREPERSON WILL FILL IN THE FORM, SIGN IT, AND DATE IT,  
2 AND ADVISE THE COURT THROUGH THE MARSHAL THAT YOU ARE READY TO  
3 RETURN TO THE COURTROOM.

4 AS SOON AS WE GET THE FINAL COPY FINALIZED, WE WILL GIVE  
5 YOU EACH A COPY OF THE FINAL JURY INSTRUCTIONS. MS. RILEY  
6 WILL COLLECT FROM YOU THE PRELIMINARY JURY INSTRUCTIONS. AND  
7 AS I SAID EARLIER, THOSE WERE INCOMPLETE AND SOMEWHAT SUBJECT  
8 TO CHANGE. WE WILL TAKE THOSE BACK SO YOU DON'T GET CONFUSED  
9 WITH THEM, AND YOU WILL USE THE FINAL JURY INSTRUCTIONS.

10 AS SOON AS WE GET THEM FINALIZED AS WELL, WE WILL SEND  
11 BACK THE STACK OF EXHIBITS THAT YOU WILL BE ABLE TO LOOK AT.

12 I UNDERSTAND THAT AT LEAST ONE OF YOUR JURORS IS NOT ABLE  
13 TO STAY PASSED 1:30 TODAY, SO YOU WILL NEED TO RECESS AT  
14 1:30 IF THERE IS SOMEONE WHO CAN'T STAY. IF THAT'S THE CASE,  
15 THEN YOU PROBABLY SHOULDN'T GO OUT TO LUNCH BECAUSE THAT WOULD  
16 GET YOU BACK HERE AFTER 1:30. SO WE WILL USE OUR USUAL  
17 SCHEDULE IF SOMEONE DOES NEED TO LEAVE.

18 IF THAT'S THE CASE AND YOU HAVEN'T REACHED A VERDICT BY  
19 THAT TIME, YOU WILL NEED TO COME BACK TOMORROW MORNING.

20 YOU HAVE ANOTHER JUROR WHO HAS AN OBLIGATION IN THE  
21 MORNING AND WHO, GIVEN TRAFFIC AND ALL, MAY NOT BE ABLE TO BE  
22 HERE UNTIL NINE TOMORROW. SO JUST SO YOU AREN'T HERE WAITING  
23 FOR ANYONE, I WILL HAVE YOU COME BACK TOMORROW AT 9:00 O'CLOCK  
24 INSTEAD OF 8:30. YOU WILL NEED, IF THAT JURY IS DELAYED MORE  
25 THAN EXPECTED, YOU WILL NEED TO WAIT FOR THAT JUROR AND DON'T

1 START TALKING ABOUT THE CASE. YOU CAN TALK ABOUT THE BASEBALL  
2 OR WHATEVER YOU LIKE UNTIL THAT TIME.

3 AND WHEN ALL THE JURORS ARE PRESENT AT 9:00 O'CLOCK OR  
4 BEFORE OR AFTER THAT, THEN YOU CAN START DELIBERATING AGAIN.  
5 AND, AGAIN, YOU HAVE A JUROR WHO CANNOT STAY PASSED 1:30. I  
6 WOULD ASK YOU ALL TO GIVE IT ANOTHER SHOT AND SEE IF YOU MIGHT  
7 COULD STAY A BIT LONGER BECAUSE IF YOU DON'T FINISH ON FRIDAY,  
8 YOU WILL NEED TO COME BACK AT 8:30 ON MONDAY MORNING TO  
9 CONTINUE DELIBERATING.

10 SO WITH THAT, I WILL EXCUSE YOU TO BEGIN YOUR  
11 DELIBERATIONS.

12 I AM SORRY, ONE MORE THING. WE HAVE THE MARSHAL HERE I  
13 MENTIONED WILL BE OUTSIDE YOUR DOOR.

14 STEP FORWARD PLEASE, SIR, AND BE SWORN.

15 (COURT SECURITY OFFICER SWORN.)

16 **THE COURT:** YOU CAN GO AROUND THE OTHER WAY THROUGH  
17 THE HALLWAY AND BE STATIONED OUTSIDE THE JURY ROOM DOOR.

18 I WON'T SPEAK WITH YOU AGAIN AT 1:30. IF YOU LEAVE AT  
19 THAT POINT OR SHORTLY THEREAFTER AND HAVEN'T REACHED A  
20 VERDICT, BUT REMEMBER ONCE YOU HAVE LEFT THE JURY ROOM, YOU  
21 SHOULD NOT DISCUSS THE CASE EVEN AMONGST A FEW OF YOU OR WITH  
22 ANYONE ELSE NOR SHOULD YOU DO ANY INVESTIGATION ABOUT THE CASE  
23 ON YOUR OWN.

24 LEAVE YOUR NOTES AND THE INSTRUCTION FORMS AND, OF COURSE,  
25 THE EVIDENCE IN THE JURY ROOM IN THE EVENING WHEN YOU LEAVE.



1 SO, WITH THAT, THEN YOU MAY RECESS TO BEGIN YOUR  
2 DELIBERATIONS.

3 (JURORS BEGIN DELIBERATIONS.)

4 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

5 **THE COURT:** I WOULD LIKE TO SPEAK WITH THE ATTORNEYS  
6 FOR A MOMENT.

7 I MEANT TO ASK YOU THIS BEFORE I READ IT, SO I HAD TO READ  
8 IT THE WAY IT WAS, ON PAGE 20 THERE'S AN INSTRUCTION THAT SAYS  
9 "THE EFFECT OF SELLING THE PATENTED SPECIALTY IN PROMOTING  
10 SALES".

11 I DON'T KNOW WHAT A PATENTED SPECIALTY IS AND I WOULD LIKE  
12 TO CHANGE IT TO SOMETHING UNDERSTANDABLE IN THE WRITTEN  
13 VERSION. SO IF SOMEONE CAN OFFER ME A SYNONYM FOR PATENTED  
14 SPECIALTY, I WOULD APPRECIATE IT.

15 **MR. REINES:** THIS IS IN THE GEORGIA-PACIFIC FACTORS?

16 **THE COURT:** I DON'T KNOW. IT'S ON PAGE 20, FACTOR 6,  
17 LINE 3. IT WAS IN YOUR PROPOSED INSTRUCTIONS, I BELIEVE. AND  
18 I MEANT TO ASK BUT I FORGOT.

19 **MR. REINES:** I THINK I AM COMFORTABLE INCLUDING  
20 INVENTION IN THERE. I'M SURE COUNSEL WILL AGREE WITH THAT.

21 **THE COURT:** EFFECT OF SELLING THE INVENTION?

22 **MR. DINOVO:** PATENTED INVENTION, I GUESS.

23 **THE COURT:** PATENTED INVENTION?

24 **MR. REINES:** YES.

25 **THE COURT:** OKAY.

1 SO I'M GOING TO MAKE THAT AND A COUPLE OF OTHER TYPOS I  
2 CAUGHT AS I WAS READING THEM. AND THEN I WILL MAKE COPIES FOR  
3 THEM, I'LL E-FILE THEM AND MAKE COPIES FOR YOU. I FIXED THE  
4 NUMBERING ISSUE ON THE VERDICT FORM AND E-FILE THAT AND MAKE  
5 COPIES FOR THEM AND FOR YOU.

6 I STILL WILL NEED TO SEE THAT CODE EXHIBIT BEFORE WE CAN  
7 SEND THE EXHIBITS BACK.

8 AND AS I SAY, YOU WILL NEED TO LEAVE CELL PHONES THAT YOU  
9 HAVE ON AND RINGING -- YOU WOULD BE SURPRISED HOW MANY PEOPLE  
10 DON'T -- WITH MS. RILEY SO SHE CAN REACH YOU. SHE WILL LET  
11 YOU KNOW IF THEY DO LEAVE AT 1:30, SHE WILL LET YOU KNOW SO  
12 YOU CAN LEAVE AS WELL. AND THEN YOU NEED TO BE BACK AGAIN ON  
13 CALL AS OF 9:00 O'CLOCK TOMORROW MORNING UNTIL YOU HEAR  
14 OTHERWISE FROM US.

15 **MS. GLAUSER:** YOUR HONOR, FOR PURPOSES OF THE  
16 APPELLATE RECORD, SHOULD IT BE NECESSARY, WE WOULD LIKE TO  
17 OFFER THE ORIGINAL 175A, B AND C AS AN OFFER OF PROOF THAT  
18 CONTAINS THE SOURCE CODE PAGES THAT WE THINK ARE NECESSARY TO  
19 SUPPORT DR. DEVANBU'S TESTIMONY.

20 **THE COURT:** OKAY.

21 **MS. GLAUSER:** SO, IF WE CAN PROVIDE THOSE. WE DON'T  
22 HAVE ELECTRONIC COPIES BECAUSE PURSUANT TO THE PROTECTIVE  
23 ORDER, WE ARE NOT ALLOWED TO SCAN IT, SO IT WOULD BE -- I  
24 DON'T KNOW HOW YOU WOULD LIKE TO HANDLE THAT PROCEDURALLY  
25 BECAUSE THE OTHER SIDE HAS ASKED US TO ONLY SUBMIT THEM

1 MANUALLY.

2 **THE COURT:** WELL, THAT'S NOT SOMETHING WE HAVE TO  
3 RESOLVE RIGHT THIS SECOND. THAT'S YOUR OFFER OF PROOF. I  
4 GUESS YOU WANT THE WHOLE BOOK IN FOR THE NINTH CIRCUIT'S  
5 BENEFIT? DO YOU HAVE SOMETHING YOU WANT TO GO TO THE JURY?

6 **MS. GLAUSER:** YES, YOUR HONOR. WE ARE CURRENTLY  
7 PREPARING SOMETHING THAT IS ACCOMMODATING TO YOUR INSTRUCTIONS  
8 OF JUST THE LINES. WE JUST WANTED TO RESERVE FOR THE  
9 APPELLATE RECORD TO EITHER HAVE THE PAGES WE ORIGINALLY  
10 SUBMITTED, OR THAT ALTERNATIVELY THE DEMONSTRATIVES THAT  
11 DR. DEVANBU USED.

12 **THE COURT:** WELL, THAT'S EASY. YOU WOULD BE  
13 SATISFIED FOR YOUR OFFER OF PROOF PURPOSES THAT WE USE THE  
14 DEMONSTRATIVES?

15 **MS. GLAUSER:** WE WOULD AS AN ALTERNATIVE, YOUR HONOR.

16 **THE COURT:** YOU WANT THOSE UNDER SEAL AS WELL?

17 **MS. GLAUSER:** THOSE WERE ADMITTED IN OPEN COURT.

18 **MR. REINES:** IT'S CODE FOR THE KEYS TO UNLOCK DRM.

19 **THE COURT:** IF YOU WANT IT, YOU WANT IT. I DON'T  
20 CARE.

21 **MR. REINES:** YES.

22 **THE COURT:** BUT AT LEAST IT'S DIGITAL SO WE CAN PUT  
23 IT UNDER SEAL DIGITALLY INSTEAD OF HAVING PIECES OF PAPER  
24 FLOATING AROUND.

25 **MS. GLAUSER:** YES, YOUR HONOR.

1           **THE COURT:** YOU MAY SUBMIT A SEALING ORDER AND FILE  
2 THOSE AND I'LL SIGN A SEALING ORDER THAT THOSE CAN BE FILED  
3 UNDER SEAL AS AN OFFER OF PROOF AND THEN THE PART THAT'S  
4 ACTUALLY GOING TO THE JURY, TRY TO GET IT AS SOON AS YOU CAN  
5 BECAUSE THEY START GETTING ANTSY ABOUT GETTING THEIR COPIES.

6           SHOW IT TO THE OTHER SIDE FIRST AND THEN GIVE IT TO  
7 MS. RILEY.

8           **MS. GLAUSER:** WE ARE.

9           **MR. REINES:** THANK YOU, YOUR HONOR. WE APPRECIATE  
10 IT.

11          **THE CLERK:** I NEED A CONTACT PERSON FOR EACH SIDE.

12          (RECESS TAKE AT 12:26 P.M.; RESUMED AT 2:05 P.M.)

13          (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

14          **THE COURT:** PLEASE BE SEATED.

15          WE ARE GOING TO CALL DIGITAL REG FIRST, SO YOU ALL CAN  
16 COME UP.

17          **THE CLERK:** WE ARE CALLING C-12-1971, DIGITAL REG OF  
18 TEXAS, LLC VERSUS ADOBE SYSTEMS INCORPORATED, ET AL.

19          PLEASE STATE YOUR APPEARANCES.

20          **MS. GLAUSER:** NICKI GLAUSER WITH DINOVO PRICE  
21 ELLWANGER ON BEHALF OF DIGITAL REG.

22          **MR. REINES:** EDWARD REINES ON BEHALF OF ADOBE.

23          **THE COURT:** SO THIS IS JUST NOT WHAT I WAS PICTURING.  
24 WHAT IS ADOBE'S VIEW OF THIS?

25          **MR. REINES:** WELL, WE CERTAINLY DON'T WANT THE

1 DEMONSTRATIVES TO GO IN. AND IN TERMS OF THE BULK SOURCE  
2 CODE, I DON'T KNOW HOW THEY CAN POSSIBLY MAKE SENSE OF IT. IT  
3 WASN'T REFERRED TO IN EXAMINATION. THERE IS NO DISPUTE ABOUT  
4 THE FUNCTIONING OF THE PRODUCT IN ANY MATERIAL WAY BASED ON  
5 WHAT WE HEARD IN CLOSE.

6 I JUST I DON'T SEE THE BASIS FOR THROWING THAT ALL INTO  
7 THE JURY ROOM.

8 **THE COURT:** BUT APART FROM THAT, DO YOU HAVE A  
9 DISAGREEMENT -- I MEAN, DO YOU FIND IT PREJUDICIAL IN SOME  
10 WAY? ARE YOU CONCERNED ABOUT IT? IS IT JUST SORT OF A  
11 BURDENSOMENESS ISSUE?

12 **MR. REINES:** WELL, DEPENDS ON WHICH TENDER WE ARE  
13 TALKING ABOUT. TO THE --

14 **THE COURT:** THE CURRENT THING, I GUESS, IS WE HAVE  
15 THIS THING THAT'S ABOUT MAYBE A HALF INCH THINK THAT  
16 APPARENTLY DIGITAL REG IS REPRESENTING CONTAINS ONLY THE CODE  
17 THAT WAS ACTUALLY PLACED ON THE DEMONSTRATIVES THAT WERE SHOWN  
18 TO THE JURY. AND THEN, TO BACK THAT UP, ALTHOUGH I HAVEN'T  
19 FULLY BEEN ABLE TO SEE WHETHER IT IS BACKED UP. TO BACK THAT  
20 UP, I HAVE APPARENTLY ALL OF THE DEMONSTRATIVES THAT DEVANBU  
21 USED FROM WHICH ONE COULD, ONE HOPES, LOOK AND SEE IF THIS IS  
22 ALL THERE.

23 SO, THEIR CURRENT NOTION IS TO FILE ALL OF THE  
24 DEMONSTRATIVES AS AN OFFER OF PROOF ABOUT THE EVEN LARGER  
25 EXHIBIT THAT I WOULDN'T ALLOW AND TO GIVE TO THE JURY THIS

1 HALF-INCH THICK EXHIBIT THAT SUPPOSEDLY HAS ONLY THE CODE THAT  
2 WAS IN THE DEMONSTRATIVES.

3 THAT IS WHAT WE ARE TALKING ABOUT. TO ME, THIS IS STILL  
4 TOO BIG. IF YOU HAD SOME KIND OF PREJUDICE ARGUMENT ABOUT IT  
5 I WOULD LISTEN TO THAT. OTHERWISE, I WILL JUST CONSIDER THE  
6 BURDENSOMENESS ARGUMENT FOR THE JURY.

7 **MR. REINES:** THE ONLY PREJUDICE ARGUMENT THAT WE HAVE  
8 IS THE CONFIDENTIALITY CONCERNS BECAUSE IT'S DRM TECHNOLOGY  
9 ABOUT HOW ALL OF THE CONTENT THAT IS BEING USED IN FLASH AND  
10 OTHER SYSTEMS IS PRESERVED. SO IT IS VERY SERIOUS.

11 BUT WITH US MAINTAINING IT UNDER SEAL AND PROTECTED, WE  
12 DON'T HAVE ANY OTHER ARGUMENT BEYOND THAT.

13 **THE COURT:** OKAY. AND WHY DO YOU WANT ALL THIS? DO  
14 YOU THINK THERE'S SOMEBODY BACK THERE WHO IS GOING TO BE ABLE  
15 TO READ IT? AND YOU ARE HOPING THEY WILL READ IT AND FIGURE  
16 SOMETHING OUT THAT WASN'T ARGUED? WHAT EXACTLY ARE YOU AIMING  
17 AT HERE?

18 **MS. GLAUSER:** THERE WAS TESTIMONY WHERE DR. DEVANBU  
19 WOULD CITE A PARTICULAR FUNCTION AND CALL IT OUT. AND IT  
20 NEEDS TO BE THAT THE FACTS UPON WHICH HE RELIED TO SUSTAIN THE  
21 BASIS FOR HIS OPINION AVAILABLE FOR THE JURY. AND TO THE  
22 EXTENT THE JURY COMES BACK WITH A DECISION THAT WE FEEL WE  
23 NEED TO APPEAL WE NEED TO HAVE THAT UNDERLYING FACTUAL BASIS  
24 IN THE RECORD FOR THE APPEAL.

25 **THE COURT:** WELL, THAT YOU'LL HAVE WITH YOUR OFFER OF

1 PROOF. THAT IS NO PROBLEM. BUT DO YOU -- DO YOU THINK THE  
2 JURY WILL BE ABLE TO MAKE SENSE OUT OF THIS? OR YOU THINK  
3 THERE IS SOMEONE ON THE JURY, LIKE THE SOFTWARE ENGINEER, FOR  
4 EXAMPLE, WHO WILL BE ABLE TO INTERPRET IT FOR THE OTHER JURORS  
5 AND ESSENTIALLY GIVE UNTESTED EVIDENCE?

6 **MS. GLAUSER:** I DON'T KNOW WHETHER ANY OF THE JURORS  
7 CAN READ CODE FROM LINE TO LINE. I SURELY CANNOT. WHAT I CAN  
8 DO, YOU KNOW, TO THE EXTENT THAT DR. DEVANBU TESTIFIED THAT A  
9 PARTICULAR FUNCTION IS CALLED, AND THE JURORS ARE INTERESTED  
10 IN THAT FUNCTION, IT'S IDENTIFIED BY NAME IN THE CODE.

11 NOW, I DON'T EXPECT THE JURORS TO BE ABLE TO READ FROM  
12 START TO FINISH, AND PARTICULARLY NOT WITH THAT SUBMISSION  
13 SINCE IT'S JUST INDIVIDUAL LINES BE ABLE TO READ THE  
14 FUNCTIONALITY THAT WOULD BE ACTUALLY OPERATING ON THE  
15 SOFTWARE.

16 **THE COURT:** OKAY. SO ASIDE FROM FORMALISTIC REASONS  
17 OF WANTING IT IN THE RECORD, TELL ME AGAIN WHY YOU THINK IT  
18 WOULD BE USEFUL TO THE JURY TO HAVE THIS.

19 **MS. GLAUSER:** I THINK IT DOES GO TO DR. DEVANBU'S  
20 CREDIBILITY AND THE BASIS FOR HIS OPINION AND THE JURY  
21 WEIGHING HIS OPINION AND THE ULTIMATE CONCLUSIONS THAT HE CAME  
22 TO.

23 TO THE EXTENT I DON'T KNOW WHAT THE JURY WILL WANT TO PULL  
24 FROM FROM THE EVIDENCE THAT WAS ENTERED IN THE TRIAL. BUT TO  
25 THE EXTENT THAT HE TESTIFIED THIS IS WHAT THE CODE FUNCTION

1 IS, AND THEY WANT TO LOOK AT THAT, IT WAS SOMETHING THAT HE  
2 TESTIFIED ABOUT. AND I THINK THE JURY SHOULD HAVE THE  
3 OPPORTUNITY TO DO SO.

4 I CANNOT SPEAK TO WHETHER OR NOT I THINK IT IS LIKELY THAT  
5 WOULD HAPPEN. I DON'T KNOW WHAT QUESTIONS THE JURORS WILL  
6 HAVE OR WHAT EVIDENCE THEY WANT TO PULL FROM THE EVIDENCE THAT  
7 GOES BACK TO THE JURY ROOM.

8 **THE COURT:** WELL, NO ONE SAID THAT THAT WASN'T THE  
9 SOURCE CODE. AND NO ONE SAID THAT THAT WASN'T WHAT THE SOURCE  
10 CODE DID OR FUNCTIONED AS. SO IT REALLY ISN'T ACTUALLY IN  
11 DISPUTE. I JUST FIND IT CONFUSING AND BURDENSOME, AND I'M  
12 WORRIED THAT SOMEONE BACK THERE CAN READ IT AND WILL MISREAD  
13 IT, OR COME UP WITH SOME ODD CONCLUSION FROM IT THAT NO ONE  
14 HAS ANTICIPATED. THAT'S -- THOSE ARE THE REASONS I DON'T  
15 ESPECIALLY WANT TO PUT IT IN.

16 **MS. GLAUSER:** I UNDERSTAND.

17 **THE COURT:** I'M TRYING TO FIGURE OUT WHAT EXACTLY IS  
18 HERE? WHAT I HAD IN MIND -- I'M AMAZED TO SEE HOW MUCH SOURCE  
19 CODE WAS ACTUALLY ON THESE DEMONSTRATIVES. BUT WHAT I HAD IN  
20 MIND WAS TO HAVE LITERALLY ONLY LETTERS THAT ARE ON HERE BE IN  
21 THIS. NOT IF A LINE IS CITED HERE, THEN YOU GET TO QUOTE THE  
22 WHOLE LINE. JUST LITERALLY IF IT SAYS: "A, B, C, D, 1, 2,  
23 3," THEN YOU GET A, B, C, D, 1, 2, 3, PERIOD.

24 **MS. GLAUSER:** IF THAT IS YOUR HONOR'S PREFERENCE,  
25 THEN THAT'S WHY WE HAVE SAID LET'S DO THE DEMONSTRATIVES.



1 BECAUSE THERE SIMPLY ISN'T ENOUGH --

2 **THE COURT:** I CAN SEE WHY THEY DON'T WANT TO DO THAT  
3 BECAUSE -- I MEAN, WE CAN PULL OUT JUST THE SOURCE CODE. THAT  
4 MIGHT WORK. BUT, NO, THEY DON'T WANT THE OTHER STUFF IN HIS  
5 DEMONSTRATIVES AND NOT HAVE ANY OF THEIR DEMONSTRATIVES IN.  
6 SO THAT IS NOT GOING TO WORK.

7 BUT, YES, IF YOU CAN PULL OUT JUST LITERALLY THE SOURCE  
8 CODE FROM THE DEMONSTRATIVES.

9 **MS. GLAUSER:** THE PROBLEM WITH THAT, YOUR HONOR, IS  
10 TWO-FOLD. ONE, PRACTICALLY, I DON'T THINK THERE IS ANY WAY TO  
11 PULL THAT CODE OUT IN A REASONABLE AMOUNT OF TIME TO GET THAT  
12 EVIDENCE TO GO BACK TO THE JURY. SO I THINK OUR POSITION  
13 WOULD BE THAT WE WOULD LIKE TO STAND ON OUR OFFER OF WHAT WE  
14 THINK THE EVIDENCE IS, AND HAVE YOUR HONOR RULE. AND WE WILL  
15 STICK BY THE OFFER OF PROOF, IF WE NEED TO.

16 **MR. REINES:** YOUR HONOR, THE CODE -- AS I UNDERSTAND  
17 IT, IN THIS BIG EXHIBIT, THE REASON IT IS SO BIG COMPARED TO  
18 YOUR EXPECTATIONS IS THAT EXCEEDS WHAT WAS ON THE ACTUAL  
19 DEMONSTRATIVE.

20 **THE COURT:** YES. I THINK WHAT IS HAPPENING IS IF THE  
21 DEMONSTRATIVES GAVE THE TITLE AND THE LINE NUMBERS, THEN IN  
22 ADDITION THEY WOULD PUT THE TITLE AND THE LINE NUMBERS AND  
23 QUOTE THE LINES, NOT JUST THE LINE NUMBERS.

24 **MR. REINES:** THAT'S CORRECT.

25 **THE COURT:** SO THAT, I THINK, IS WHY THIS ONE IS

1 BIGGER THAN I THOUGHT IT WOULD BE.

2 **MR. REINES:** YOU ARE CORRECT.

3 **THE COURT:** SO WHAT I WILL DO IS I WILL ADMIT  
4 LITERALLY THE LETTERS AND NUMBERS THAT ARE IN THE  
5 DEMONSTRATIVES ON THIS, AND NO MORE THAN THAT.

6 SO IF YOU WOULD LIKE THAT, YOU CAN PREPARE SUCH AN  
7 EXHIBIT. BUT JUST BECAUSE YOU PUT A LINE NUMBER HERE DOESN'T  
8 MEAN YOU GET THE LINE. YOU GET THE -- AM I MAKING MYSELF  
9 CLEAR?

10 **MS. GLAUSER:** YOU ARE SAYING A CITATION TO THE SOURCE  
11 CODE, NOT WHAT THE SOURCE CODE SAYS ON THAT CITED LINE?

12 **THE COURT:** NO. I'M SAYING THAT THE ONLY THING THE  
13 JURY SEES ARE LETTERS AND NUMBERS THAT THEY ALREADY SAW ON  
14 THESE DEMONSTRATIVES.

15 IF THIS SAYS "A, B, C, 1, 2, 3," THEN YOU GET TO SAY "A,  
16 B, C, 1, 2, 3."

17 THIS SAYS LINES ONE TO FOUR, YOU DON'T GET ANYTHING.

18 **MS. GLAUSER:** I GUESS IT WILL TAKE US SOME TIME TO BE  
19 ABLE TO DO THAT. MAYBE THERE IS SOMETHING WE CAN CONFER  
20 FURTHER ON TONIGHT. AND SEND THEM, I GUESS, AGAIN WHAT OUR --

21 **THE COURT:** WELL, IT SHOULDN'T BE THAT --

22 **MS. GLAUSER:** THE NEW VERSION OF THAT. WE WOULD HAVE  
23 TO BE ABLE TO COPY AND PASTE FROM --

24 **THE COURT:** THIS IS WHAT I MEANT ALL ALONG.

25 **MR. REINES:** IT IS CLEAR, YOUR HONOR. WE WILL DO OUR

1 BEST TO MAKE SURE THAT THEY DO WHAT THE COURT HAS DIRECTED.

2 **MS. GLAUSER:** WE APPRECIATE THE OFFER, AND WE WILL  
3 ATTEMPT TO DO THAT AND SHARE IT WITH THE OTHER SIDE. AND THEY  
4 CAN LET US KNOW IF IT IS ACCEPTABLE.

5 I THINK TO THE EXTENT WE GO THIS ROUTE WE WOULD STILL LIKE  
6 IT TO BE SUBJECT TO OUR OFFER OF PROOF THAT IT IS STILL  
7 INSUFFICIENT FOR WHAT WE WANT TO OFFER.

8 **THE COURT:** YOU HAVE MADE THAT CLEAR, AND WE WILL  
9 SUBMIT ALL OF YOUR DEMONSTRATIVES UNDER SEAL, AND THE COURT OF  
10 APPEAL CAN DO WHATEVER THEY WANT TO WITH THEM. BUT FOR  
11 PURPOSES OF THIS JURY I WILL ONLY SEND THEM WHAT I JUST SAID?  
12 AND I WILL DO THAT IF YOU GET IT TO ME BEFORE THEY REACH A  
13 VERDICT.

14 **MS. GLAUSER:** UNDERSTOOD. WE WILL WORK VERY QUICKLY,  
15 YOUR HONOR.

16 **MR. REINES:** THANK YOU, YOUR HONOR.

17 **THE COURT:** OKAY.

18 (PROCEEDINGS CONCLUDED AT 2:14 P.M.)  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF REPORTER**

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE  
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY  
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

FRIDAY, SEPTEMBER 5, 2014